

**UNITED STATES - DEFINITIVE SAFEGUARD MEASURES
ON IMPORTS OF CERTAIN STEEL PRODUCTS
WT/DS 249**

**SECOND WRITTEN SUBMISSION OF THE
GOVERNMENT OF JAPAN**

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I. INTRODUCTION

1 The thrust of the U.S. position in this case is that certain steel-producing industries in the United States were so seriously injured in 2001 that the U.S. Government had no choice but to help them by imposing the safeguard measures at issue. The United States also argues that it was entitled to do so under the Agreement on Safeguards because of that Agreement's *protectionist* purpose and lack of explicit disciplines. The problem with this, contrary to what the U.S. believes, the Agreement on Safeguards exists to police the way in which WTO Members justify and apply such measures. There is also a body of WTO jurisprudence that clarified the relevant standards, and that the United States failed to meet in this case. Complainants in this case have presented the Panel with myriad examples of how the U.S. steel safeguard measures fell far short of the standards set forth in the Agreement on Safeguards, as well as GATT 1994.

2 In this second written submission, Japan does not repeat each of its claims, but instead rebuts the arguments regarding those claims as set forth in the U.S. first submission and in its answers to questions posed by the Panel and by other parties. In rebutting the U.S. arguments, we attempt in some instances to clarify and expand, as necessary, the arguments that appeared in our first submission.

3 Japan notes at the outset that none of the claims we have pursued in this case are dependent on any other claims. They all stand on their own. Nonetheless, it is important to recognize that if the Panel agrees with us that the U.S. grouping of slab, plate, hot rolled, cold rolled, and corrosion resistant into a single like product is inconsistent with WTO obligations, then it is necessarily also true that each of the other elements of the U.S. decision to impose safeguards on these flat rolled products is also inconsistent with WTO obligations. That being said, we encourage the Panel to address each of the other claims we have made in this case, so as to prevent the United States from repeating in the future the same methodological mistakes it made in this case (many of which have already been identified as problematic by the Appellate Body in previous cases).¹

II. THE UNITED STATES MISUNDERSTANDS THE IMPORTANT ROLE THAT COMPETITION PLAYS IN DEFINING “LIKE” PRODUCTS IN A SAFEGUARD CONTEXT

4 The United States would have the Panel believe that there is no relevant textual or contextual precedent to help discern the proper treatment of “like product” under the Agreement on Safeguards. In the U.S. view, as long as there is a one-to-one relationship between an imported product grouping and the domestic “like” product grouping, a competent authority can define the products as broadly as it likes. The concept of competition between products within those groupings is not relevant to the analysis, according to the United States.

¹ We note that Japan's claims are not limited to the U.S. measures on flat rolled products, since our claims encompass those measures related to the U.S. decisions on tin mill and stainless wire products as well as those related to all the products subject to the safeguard measures (such as those about violation of the MFN principle and parallelism requirement).

5 The United States is wrong, for multiple reasons. First, the slate is not nearly as blank as the United States would have the Panel believe. Relevant jurisprudence exists in *Lamb Meat* in the context of the Agreement on Safeguards itself, and in *Cotton Yarn* in the context of the safeguard provisions of the Agreement on Textiles and Clothing (“ATC”). A careful reading of these reports demonstrates that U.S. efforts to distinguish them must fail. Furthermore, given the purpose of the Agreement on Safeguards, the jurisprudence concerning like product delineations under Article III of GATT 1994 also is relevant.

6 If the Panel takes this jurisprudence into account, it will find that the U.S. position is untenable. Despite U.S. arguments to the contrary, the central purpose of the “like or directly competitive” product analysis is to define appropriately the domestic industry whose performance is allegedly hampered by competition with imported products subject to the investigation. This competitive relationship between the domestic industry’s product and imports must exist regardless of whether the domestic product is deemed “like” or “directly competitive” with the imported product. Absent this tight competitive nexus -- which is required by both the “like” and the “directly competitive” standards -- it makes no sense to blame imports for whatever problems the domestic industry may be experiencing.

7 The ITC completely ignored the importance of competition in delineating the like products for certain carbon (and alloy) flat rolled steel (“CCFRS”). The overbroad CCFRS grouping in turn necessarily masked the true competitive dynamics in the flat rolled steel markets, because the real competitive relationships exist only between imported and domestic products that are subcomponents of this overbroad grouping -- such as between imported slab and domestic slab, but not imported slab and domestic corrosion resistant steel. The overbroad grouping, in turn, rendered the analysis required by the Agreement on Safeguards entirely meaningless. When this happens, the **import trends** for one type of product are by definition masked by those of other types of products; **serious injury** is blurred as between the various distinct industries involved; the **causal relationships** between increased imports and the industries’ alleged injury are impossible to untangle; and a **proper remedy** is elusive. Under such circumstances, although a safeguard measure might be justified with respect to a portion of the targeted imports, imposition of a measure against all imports as a group inevitably results in protecting industries that do not deserve protection -- a result the Appellate Body specifically criticized in *Lamb Meat* and *Cotton Yarn*.

8 We should note here how the “like product” question is interrelated with the “a product” argument. “A product” or “such product” refers to a certain scope of imported products subject to a safeguard investigation. The boundary of the imported product should provide a reasonable basis for a meaningful like (or directly competitive, if applicable) product analysis/comparison vis a vis domestic products. If it is ensured that the imported products and the domestic products have the proper competitive relationship, this boundary for the imported products is eventually narrowed down to meet the “like product” criteria, i.e., physical properties, end-use, consumer perception, and tariff classification.

A. Appellate Body Jurisprudence Supports Japan's Interpretation of Like Product

9 The Appellate Body has spoken repeatedly on the issue of “like product,” including in the safeguards context. We discuss below the relevant jurisprudence under the Agreement on Safeguards and the safeguard provision of the ATC. We then explain why the jurisprudence under Article III of GATT 1994 also is relevant.

1. Jurisprudence in the Safeguards Context

10 The obvious starting point for discerning the proper scope of the domestic like product is *Lamb Meat*. The United States would have the Panel mostly ignore *Lamb Meat*. They try first to draw a distinction, arguing that *Lamb Meat* was about the appropriate “domestic industry” definition whereas our arguments concern “like product.”² In our view, this is a distinction without a difference. After all, as specified in Article 4.1(c) of the Agreement on Safeguards, the scope of the like (or, if applicable, directly competitive) product defines the scope of the relevant domestic industry. Ultimately, the inquiry is about defining the “like” product and domestic industry in ways that reflect meaningful and substantial competitive interactions. The United States also tries to distinguish *Lamb Meat* because the ITC in that case found that the imported product and the domestic like product were limited to lamb meat, not live lambs; the problem the Appellate Body identified was merely that the industry producing the like product was defined too broadly to include producers (growers and feeders) who did not produce the like product.³ The United States claims that it has complied with *Lamb Meat* because there is a one-to-one relationship between the imported product and the domestic like product in the ITC’s steel safeguard analysis, and because the producers of the domestic like product actually produce the same range of products as the subject imported products.⁴

11 The U.S. theory is flawed. Taken to its logical extreme, a competent authority would be authorized to combine any number of products, regardless of the extent of their likeness. Indeed, if it were true, we see no reason why the United States would not have simply conducted an investigation and imposed a measure on imports of all “steel.”

12 The reason the United States did not impose a measure on “steel” is that it knows there must be some control on the scope of like product definitions under the Agreement on Safeguards. That control is evident in *Lamb Meat*. The Appellate Body clarified the overarching importance of ensuring that the nexus between imports and their domestic counterparts -- whether like or directly competitive -- is close enough to ensure that a measure is not imposed to protect industries that do not make like or directly competitive products:

In our view, it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic

² See U.S. First Submission, para. 70.

³ *Id.* at para. 70.

⁴ *Id.* at para. 98.

producers of products that are *not* “like or directly competitive products” in relation to the imported product.⁵

The point here is that the like product -- and, in turn, the industry -- cannot be so broadly defined as to provide protection to producers of products with which the imports do not compete.

13 The Appellate Body went on to say that a continuous line of production between products -- a characteristic heavily relied upon by the United States in the case of flat rolled steel products -- is insufficient to overcome their lack of “likeness”:

If an input product and an end-product are not “like” or “directly competitive”, then it is irrelevant, under the Agreement on Safeguards, that there is a continuous line of production between an input product and an end-product, that the input product represents a high proportion of the value of the end-product, that there is no use for the input product other than as an input for the particular end-product, or that there is a substantial coincidence of economic interests between the producers of these products. In the absence of a “like or directly competitive relationship”, we see no justification, in Article 4.1(c) or any other provision of the Agreement on Safeguards, for giving credence to any of these criteria in defining the domestic industry.⁶

This passage from *Lamb Meat* could not be more relevant to a case like ours in which an authority has conjoined, into a single like product, products that serve as feedstock for one another, but which, in fact, have independent uses in the marketplace.

14 *Lamb Meat* therefore underlines the critical importance of the competitive dynamic that must exist between imported and domestic products, including between products that exist along a continuum of production processes. Regardless of whether the products are produced using processes that happen to be vertically integrated, if they do not compete with each other in the market place, their combination into a single grouping renders any findings by a competent authority regarding increased imports, serious injury, or causation null and void. Nor could an authority, as a result, devise a proper remedy as required under Article 5.1. Therefore, an improper definition of the domestic industry makes it impossible to ensure that the wrong industry is not protected, and necessarily leads to myriad violations of the Agreement, such as those identified by complainants in this dispute.

15 Note that the United States cites *Lamb Meat* favorably for the proposition that production processes can be relevant to discerning whether products should be separated.⁷ We find it ironic that the United States would cite this portion of *Lamb Meat* (footnote 55), given that it

⁵ United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (“U.S. – *Lamb Meat*”), WT/DS177/AB/R, WT/DS178/AB/R, Appellate Body Report, adopted 16 May 2001, para. 86.

⁶ U.S. – *Lamb Meat*, para. 90.

⁷ U.S. First Submission, para. 91 (citing U.S. – *Lamb Meat*, n.55).

demonstrates that the Appellate Body has specifically contemplated, in the context of the Agreement on Safeguards, the need in some cases to separate products from one another, whereas here the United States is defending its reliance on production process in conjoining products.⁸ Furthermore, even if production process is relevant, in any event, the U.S. reliance on this passage misses an important distinction made in *Lamb Meat* -- the distinction, on the one hand, between (a) an analysis of production processes themselves to discern the extent to which those processes create separately identifiable products and (b) the vertical integration of those processes.

16 The Appellate Body specifically stated in *Lamb Meat* that it had “reservations about the role of an examination of the degree of integration of production processes for the products at issue.”⁹ By suggesting in footnote 55 that production processes might be relevant to determining whether two articles are separate products, the Appellate Body was not endorsing an analysis of vertical integration. After all, vertical integration does not mean production processes are somehow blurred; it merely means they are under the same corporate hat, and perhaps located at the same general location. This is particularly relevant for flat rolled steel. Despite vertical integration of some (not all) flat rolled steel production, each separate product that the ITC chose to bundle is produced on different machines, housed in different buildings. Integration, therefore, determines very little about the processes themselves and the extent to which those processes create separate products.¹⁰

⁸ Note that, in footnote 55, the Appellate Body stated that the production process might be relevant in order to *separate* products “in certain cases” presumably including those where products at issue share the same or similar physical properties, end-use and consumers’ preference. In contrast, in this case, the U.S. argued that the production process can be used as a basis for *conjoining* multiple products, which do not share the same or even similar physical properties, end-use and consumers’ preference, into the same like product category.

⁹ U.S. – *Lamb Meat*, para. 94.

¹⁰ Note that the Panel in *Lamb Meat* recognized that vertical integration as such is not relevant, *citing* the *Canada Beef* (Panel Report) on the domestic industry definition:

The only case in which the fact of common ownership will affect the definition of industry will be in the case in which the common ownership results in such a complete integration of production processes that it is impossible to analyze each one separately.

Panel Report, para. 7.94. It also devised an approach for how an authority might look at the question of production processes to discern whether products are different forms of a single like product or whether they have become different products.

We agree that the factors of vertical integration or common ownership are not in themselves determinative or even particularly relevant for the scope of the domestic industry. Rather, the issue is (i) whether the products at various states of production are *different forms of a single like product* or have become *different products*; and (ii) whether it is possible to *separately identify* the production process for the like product at issue, or whether instead common ownership results in *such complete integration* of production processes that *separate identification and analysis of different production stages is impossible*.

Panel Report, para. 7.95. Application of these analyses to flat rolled steel would still result in a determination that they are different products. See paras. 40 and 41 below.

17 The U.S. ITC has plenty of experience undertaking this very analysis, without considering integration, specifically in the context of flat rolled steel. That the United States would cite to this part of *Lamb Meat* in an effort to support what it did in this case is comical. The United States knows full well that every other time it has applied an analysis of production processes to determine the proper like product scope for flat rolled steel products, it has concluded that they are distinct products (see further discussion in Section B, as well as Section IV, below).

18 Another case in the safeguards context that the United States tries to distinguish is *U.S. - Cotton Yarn*, in which the Appellate Body considered the transitional safeguard provisions -- Article 6 -- of the ATC. The Appellate Body specifically indicated, in this safeguard context, that “like” is a subset of “directly competitive,” as it had found in the context of Article III of GATT 1994.¹¹ Given that Article 6 of the ATC essentially has the same purpose as the Agreement on Safeguards, it is clear that the domestic industry must be of narrower scope under the Agreement on Safeguards when an authority relies solely on the words “like product,” as the ITC did in this case.

19 More importantly, *Cotton Yarn* also clearly established the importance of the competitive relationship between imported and domestic products in discerning whether they are like or directly competitive with one another. As the Appellate Body put it:

The criteria of “like” and “directly competitive” are characteristics attached to the domestic product *in order to ensure that the domestic industry is the appropriate industry in relation to the imported product*. The degree of proximity between the imported and domestic products in their competitive relationship is thus critical to underpin the reasonableness of a safeguard action against an imported product...

Like products are, necessarily, in the highest degree of competitive relationship in the marketplace.¹²

The Appellate Body therefore clearly recognizes the critical role competition plays in determining whether products are like one another in a safeguard context. The reason it is so important is that this competitive relationship serves as the very base for evaluating appropriately the increases in imports, the injury suffered by the domestic industry, and the causal link between the two, in order to “ensure that the domestic industry is the appropriate industry” to receive protection from imports. This is the same logic applied by the Appellate Body in *Lamb Meat*, as discussed above.

¹¹ See e.g., *Korea -- Taxes on Alcoholic Beverages*, (“*Korea -- Alcoholic Beverages*”) WT/DS75/AB/R, WT/DS84/AB/R Appellate Body Report, 18 Jan. 1999, para. 118.

¹² *United States -- Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (“*U.S. -- Cotton Yarn*”), WT/DS192/AB/R, Appellate Body Report, adopted 7 Nov. 2001, paras. 95 and 97 (emphasis added) (citing *Korea -- Alcoholic Beverages* and *Canada - Certain Measures Concerning Periodicals*, and noting that “‘like products’ are perfectly substitutable and that ‘directly competitive’ products are characterized by a high, but imperfect, degree of substitutability.”).

20 We should note here that we find it peculiar that in the U.S. Answers to Panel Questions, they admit that competition is relevant to the question of whether there are domestic products like the subject imports, but that it is irrelevant to ITC's consideration of the proper "clear dividing line" among domestic products in order to define like products.¹³ If this is the case, what is the point of discerning the clear dividing line? Are not the factors determining the extent to which products that might be conjoined are "like" one another and, therefore, the extent of their competitiveness? If not, then what is the point? We think the answers to these questions is that, in fact, the United States is not discerning the proper dividing line between products, but rather between producers. Unfortunately, for the United States, this is precisely what the Appellate Body has said is inappropriate.

2. Jurisprudence Under GATT 1994

21 While we believe that *Lamb Meat* and *Cotton Yarn* safeguard cases are important to our claims, Appellate Body jurisprudence covering GATT 1994 Article III also confirms our interpretation provides useful guidance on how to determine "likeness." The U.S. spends page after page of its First Submission desperately trying to find a way to convince the Panel to ignore these rulings, relying heavily on its misinterpretation of the *EC – Asbestos* case. But it is clear that these cases are fully relevant context for interpreting the Agreement on Safeguards.

a. The U.S. Reading of *EC-Asbestos* is Incorrect

22 The United States seeks support from *EC-Asbestos* for its argument that interpretations of Article III are irrelevant in a safeguards context. This is because, according to the United States, the Appellate Body said in that ruling that the interpretation of the term "like product" cannot be automatically transposed to other provisions or other agreements where the phrase "like product" is used.

23 To the contrary, the Appellate Body in *Cotton Yarn* clearly affirmed the contextual significance of its interpretation of Article III:2 of GATT 1994 for purposes of interpreting the same term in a safeguard context. Indeed, the Appellate Body dismissed the U.S. argument in that case that the panel erroneously relied on *Korea -Alcoholic Beverage*, using the same "different provision and different agreement" argument it espouses here.¹⁴ While *Cotton Yarn* was about the transitional safeguard provisions set forth in Article 6 of the ATC, these provisions are very much akin to Article XIX of GATT 1994 and the Agreement on Safeguards, particularly in that a measure is allowed only when it is demonstrated that "a particular product is being imported ... in such increased quantities as to cause serious damage ... to the domestic industry producing like and/or directly competitive products." If interpretation of Article III:2 of the GATT provides contextual significance for Article 6 of the ATC, then it must apply with equal force to the Article XIX and the Agreement on Safeguards. The United States is therefore wrongfully overemphasizing the Appellate Body's reservation in *EC-Asbestos* against automatic transposition.

¹³ U.S. Answers to Panel Questions, paras. 48-49 (*hereinafter* "U.S. Answers"); *see also* paras. 55-56 and 116.

¹⁴ U.S. – *Cotton Yarn*, paras. 21, 92 - 94.

24 In addition, ironically, the context in which the Appellate Body indicated its reservation concerning automatic transposition (which, in any case, was dicta in a footnote) was in interpreting the meaning of “like product” in Articles III:2 and III:4 of GATT 1994, where one provision juxtaposed “like product” against “directly competitive or substitutable” and the other did not. The fact that “like product” appeared alone in Article III:4 suggested that the scope of like product may be broader in Article III:4 than in Article III:2, second sentence, where like product is set against “directly competitive or substitutable” products.¹⁵ The “accordion of likeness” to which the Appellate Body referred in both *EC – Asbestos* and *Japan – Alcoholic Beverages* was therefore wider in Article III:4 than it was in Article III:2, second sentence.¹⁶

25 *EC – Asbestos* therefore supports Japan’s view that the concept of like product under the Agreement on Safeguards, where it is juxtaposed against directly competitive, must be viewed more narrowly than it would be in provisions or agreements where no such juxtaposition exists. The U.S. attempted reliance on this case to support a broad view of like product under the Agreement on Safeguards is therefore misplaced.¹⁷

b. The U.S. claim that GATT Article III and the Agreement on Safeguards have different purposes reflects an unfortunate misconception on the part of the United States

26 The United States argues that the GATT 1994 Article III jurisprudence on which Co-Complainants rely is irrelevant because, while Article III’s purpose is to liberalize trade, the Agreement on Safeguards exists to protect domestic industries. The United States misunderstands the purpose of the Agreement, and misconstrues the Appellate Body’s views on the subject.

27 In fact, the central teaching of *Line Pipe* is that the Agreement exists to prevent Members from abusing their right to protect domestic industries. The Appellate Body went to great lengths in that case -- much to the United States chagrin¹⁸ -- to explain how limited the right to apply safeguards measures is.¹⁹ In confirming the position set forth in its *Argentina – Footwear* report, the Appellate Body clarified in *Line Pipe* that the interpretation of any of the prerequisites for imposing safeguard measures must take into account the fact that such measures are by nature extraordinary measures against implicitly fair trade.²⁰

28 This does not reflect, as the United States likes to argue, the Appellate Body creating obligations where the text is silent. The preamble to the Agreement itself states that one of the objectives of the Agreement is to “re-establish multilateral control over safeguards.” Therefore,

¹⁵ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, (“*EC – Asbestos*”) WT/DS135/AB/R, Appellate Body Report, adopted 13 Dec. 2001, para. 95.

¹⁶ *Id.* at 96.

¹⁷ Indeed, as discussed above, the Appellate Body’s reliance on Article III jurisprudence in *U.S. – Cotton Yarn*, in a safeguard context, concerning the very same issue, proves the point.

¹⁸ See, e.g., U.S. First Submission, para. 1023 n.1337.

¹⁹ *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (“*U.S. – Line Pipe*”), WT/DS202/AB/R, Appellate Body Report, 15 Feb. 2002, paras. 80-85.

²⁰ *Id.* para. 81 quoting *Argentina – Safeguard Measures on Imports of Footwear* (“*Argentina – Footwear*”), WT/DS121/AB/R, Appellate Body Report, adopted 12 Jan. 2000.

the provisions of the Agreement -- the words, the context, and their object and purpose -- provide discipline and define the parameters a Member must respect in imposing safeguards. It is important in this regard to bear in mind that competent authorities must: (a) find not just any injury but serious injury; (b) find a causal link that does not attribute to allegedly increased imports the effects of other causes; and (c) impose relief that is no broader than necessary to address the injury caused by imports. All of these required analyses suggest that only under limited circumstances is this extraordinary protection allowed. Above all, a tight competitive nexus between imports and the domestically produced products is required to ensure an appropriately limited remedy.

29 Indeed, the Appellate Body clarified in more than one context in its *U.S. – Lamb Meat* decision that it is important not to mistakenly identify cause and effect relationships. This issue arose in the context of the domestic industry definition where the Appellate Body said that overly broad domestic industry definitions can lead to imposition of a measure “because of the prejudicial effects that an imported product has on domestic producers of products that are *not* “like or directly competitive products” in relation to the imported products.”²¹ Likewise, in *Lamb Meat* as well as in a series of other cases against the United States, the Appellate Body emphasized the importance under Article 4.2(b) of ensuring that the effects of other causes not be attributed to imports. The message is clear: the Agreement on Safeguards does not give free reign to protectionist impulses, but rather seeks to **rein in** such impulses.

30 We therefore find it curious that the U.S. would distinguish disputes over Article III on the ground that, in the words of the Appellate Body, “a determination of ‘likeness’ under Article III is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”²² In our view, the Agreement on Safeguards is no different. We agree with the United States that Article III is aimed at facilitating trade liberalization. We also do not dispute that safeguard measures are aimed at restricting trade as a “safety-valve” against such liberalization, at least temporarily when circumstances are pressing. Where we part company with the United States is over the question of whether the Agreement on Safeguards itself was intended to expand every rule in order to give Members the greatest flexibility to apply the broadest possible safeguard. In Japan’s view, the answer is clearly no. GATT Article XIX characterizes the safeguard measure as “emergency action,” demonstrating its exceptional and temporary nature. The purpose of the Agreement is to prevent abuses of this extraordinary remedy, not to encourage them.

31 It makes sense, therefore, that the central tenet of Article III jurisprudence on the question of competition between products considered to be “like” one another is applicable in the safeguard context as well. The U.S. effort to downplay the importance of competition,²³ and the applicability of the Article III jurisprudence on like product, is untenable.

c. **The four factor analysis developed in the Appellate Body’s Article III jurisprudence is the appropriate starting point for distinguishing like products**

²¹ *U.S. – Lamb Meat*, para. 86.

²² *EC – Asbestos*, para. 99.

²³ See, e.g., U.S. First Submission at paras. 81-82.

32 One of the most important aspects of this jurisprudence is the guidance it offers on how competent authorities should distinguish between separate “like” products. The Appellate Body held in *Japan - Alcoholic Beverages* and *EC – Asbestos* that the most relevant factors for determining “likeness” are:

- **the physical properties, nature and quality of the products;**
- **the extent to which the products are capable of serving the same end uses;**
- **the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and**
- **international tariff classifications.**

While Japan admits that these might not be the only factors to consider, the factors demonstrate that the analysis must address not only physical likeness, but also the extent to which the products actually compete with each other. (Indeed, physical similarity indicates that two products are more likely to compete with each other.) Only if the products compete with each other are they properly grouped together, whether in an Article III or in a trade remedy context. If the competitive nexus underlying the investigation is blurred, the required analysis to be performed in the injury investigation and in choosing an appropriate remedy becomes meaningless. In turn, the prejudicial effects against which the Appellate Body warned in *Lamb Meat* and *Cotton Yarn* cannot be prevented.

33 The U.S. claim that these cases and their proposed analytic framework are irrelevant in the safeguard context is odd given the ITC’s use of similar factors for delineating like products. In its safeguard cases, the ITC considers physical properties, end uses, marketing channels, production processes, and customs treatment in making its like product determinations. In an AD/CVD context, it also considers customer and producer perceptions of the products and sometimes price. It now claims that customer perceptions are not relevant to discerning the proper dividing line in a safeguard context.²⁴ Again, we cannot understand what the point of a “clear dividing line” is if it is not to ensure a proper comparison between competitive products. By dismissing from the analysis customer perceptions, the United States ignores a critical tool for understanding competitive dynamics -- and does so in favor of a focus on producers rather than products.

B. The U.S. Decision On Flat Rolled Products Violated The Principles Set Forth By The Appellate Body

34 The ITC in this case did not identify plate, hot rolled, cold rolled, and corrosion-resistant finished steels as separate like products, as it has done consistently in previous recent trade remedy cases covering the same products. Rather, despite the acknowledged differences in the

²⁴ U.S. Answers, para. 117.

products' physical properties, end-uses, customs treatment, and even production processes, the ITC chose to define a single "CCFRS" steel industry by conjoining the products into a single like product grouping, along with semi-finished slab products from which the finished products are made. It found, in what can only be described as a vast overgeneralization, that these products were like one another because they "share the same physical attributes and are generally interchangeable." This decision had the obvious effect of skewing the increased imports, serious injury, and causation analyses for flat rolled products -- a result which Japan can only view as deliberately aimed at trying to rationalize a wider scope of safeguard measures on flat rolled products.

35 The ITC's decision to conjoin these products into a single "flat rolled" like product is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1 of GATT 1994. There are wide differences between the five products within this grouping in terms of the factors identified by the Appellate Body for a determination on "like products": the products' physical properties, end-uses, consumer perceptions, and tariff classifications. The ITC is fully aware of those distinctions, as they have prompted opposite decisions in the past when plate, hot rolled, cold rolled, and corrosion resistant steel were deemed separate like products.²⁵ To suggest, as the United States does, that those cases involved different facts and a different body of law is specious.

36 No one in the world, whether now or 1993, thinks of flat rolled steel as a single product. The various flat rolled products do not comprise one authentic market. They are each distinct in their physical properties, use, customer perceptions, general tariff classifications, and even production processes. We have already provided support for this point, in the ITC's own words.²⁶ We supplemented this information in our **Exhibit JPN-1** accompanying our answers to the Panel's questions. As is clear there, even the United States industry breaks down its marketing and pricing materials in the manner we propose. Plate is sold and marketed separately from hot rolled, which is distinct from cold rolled, which is distinct yet again from corrosion resistant steel.

37 The fact is that each of these products has its own end uses. The U.S. argument that they have common end uses is simply not credible.²⁷ They may be sold to the same industries, but to suggest that steel products have common applications because they are used in a specific industry is to suggest that steel, plastic, and glass should be a single like product because they are all sold to the automotive industry. End use is not the same as end user. The fact is, no one would ever use slab to make a car; nor would hot rolled steel be used for the same car-part as corrosion resistant steel. They are simply different products, used for different purposes. Furthermore, they each have a base price, reflected in the companies' price sheets and in the trade literature. There is no such thing as a price for "flat rolled" (as the ITC defined it). This proves not only

²⁵ *Certain Flat Rolled Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom*, Inv. Nos. 701-TA-319-354 and 731-TA-573-620 (Preliminary) USITC Pub. 2549 at 12-17 (Aug. 1992) (No further discussion of this issue appeared in the final determination of the 1992-1993 flat rolled steel case.) (**Exh. CC-32**).

²⁶ See, e.g., Japan's First Submission, paras. 110-113.

²⁷ See, e.g., U.S. Answers, para. 67.

that the industry and customers recognize the distinctions, but also that any analysis of this grouping performed by the ITC is meaningless because there is no “flat rolled” price that can be used to determine price effects in a causation analysis; rather each individual product must be analyzed and then somehow combined with the other individual products.²⁸ As we explained at the outset, such an analysis distorts the true competitive dynamics in the marketplace.

38 As for the difference in law, the ITC relied on “like product” to define the domestic industry in this investigation and its previous flat rolled AD/CVD investigations. One might argue that safeguards investigations permit a broader definition of the industry than AD/CVD investigations, given that the Agreement on Safeguards contains both “like” and “directly competitive” whereas the AD and Subsidies Agreements contain only the word “like”. However, in this case, the ITC relied only on “like.” And, as discussed above, the concept of “like” is understood to be even more narrowly construed when it is juxtaposed against directly competitive. So, if anything, the ITC’s decision should have been narrower. Furthermore, given the discussion above demonstrating that safeguards may be applied in only the most extraordinary of circumstances, we take issue with the notion that the definition of like product may be broader in the safeguards context than in the AD/CVD context. We therefore view the ITC’s findings under these laws concerning the same products to be relevant demonstrations that even the ITC accepts the distinctions between the various flat products.

39 What this entire line of argument demonstrates is that while imports and domestic products falling within the same subcomponents -- semi-finished slab, plate, hot rolled, cold rolled, or corrosion-resistant steel products **respectively** -- might be “like products”, imports and domestic products that fall within different subcomponents are definitely not “like” one another. If they are not like one another, they may not -- under Appellate Body jurisprudence -- be grouped together into a single like product. Doing so produces results which *Lamb Meat* specifically warned against: providing relief to industries that are not the producers of like or directly competitive products.

40 The United States insists that the more relevant consideration is the “very high overlap in domestic production” or the vertical integration found in the domestic steel industries producing these products. But, as discussed above, the Appellate Body stated in *U.S. – Lamb Meat* that vertical integration is irrelevant to the question whether subject domestic products are “like products” of imports subject to investigation. Indeed, the reasoning behind the ITC’s like product determination for flat rolled steel products is almost identical to its rationale for combining lamb meat and live lambs into a single like product. Its finding that most finished flat rolled steel products are sold into the automotive and construction markets is analogous to its earlier finding of a “coincidence of economic interests” between producers of live lambs and lamb meat. Its finding that a large percentage of domestic flat rolled steel producers are vertically integrated, producing four of the five flat rolled steel products, is akin to its earlier finding of a “continuous line of production” from live lambs to lamb meat.

41 Putting integration to the side, then, and focusing on the production processes themselves (if these are deemed relevant to the analysis) it is important to note that even the ITC admits that

²⁸ See ITC Report Vol. I at 61-62.

the processes that make the various flat rolled products are distinct and that distinct products come out of them.²⁹ A slab caster is a process unto itself, entirely separate from the hot rolling and Steckel plate mills. These mills are in turn separate from cold rolling mills, as are the coating lines that make corrosion resistant steel. Each process, in turn, makes a product that can either be used as feedstock for the next stage, or be sold as finished products for end use purposes (except for slab, which is only used to make finished flat rolled steel). The processes which make these products may be located on the same general premises and be owned by the same company, but this doesn't make the processes' output "like" one another. The separate facilities in which slab is made as compared with hot rolled, cold rolled and corrosion resistant create separate products used for distinctly different purposes.

42 As the Appellate Body held in *Lamb Meat*: "[i]f an input product and an end product are not 'like or directly competitive', then it is irrelevant, under the Agreement on Safeguards, that there is a continuous line of production between an input product and an end-product...or that there is a substantial coincidence of economic interests between the producers of these products."³⁰ Rather, the focus must be on "the identification of the products, and their 'like or directly competitive' relationship, and not on the processes by which those products are produced."³¹ What matters is the competitive relationship between subject imports and domestic products, which helps to discern whether these products are "like" one another and whether, in turn, it makes sense to conjoin them together.

43 The ITC apparently understood this for other products in this same investigation. The ITC treated tin mill steel separately from corrosion resistant steel, even though these two types of coated products are far more similar to one another than slab is to corrosion resistant steel. It treated welded products as separate like products from certain flat steels, even though welded products are made directly from hot rolled steel, often by the same integrated mills that make the flat products. And it treated semi-finished long and stainless products as separate from their downstream finished products, even though their relationship to one another is no different from the relationship between slab and finished flat products. Indeed, but for flat rolled, the ITC largely adopted the delineations widely accepted by the industry that reflect well the competitive dynamics in the marketplace. It failed to do so for flat rolled, apparently in order to reach a result it could not reach if slab, plate, hot rolled, cold rolled, and corrosion resistant were separate like products.³²

²⁹ ITC Report at 40-41.

³⁰ *U.S. – Lamb Meat*, para. 90.

³¹ *Id.*

³² This is not a radical idea, though the United States tries to characterize it as such. The negative results of the recent AD/CVD cases on cold rolled steel -- both before and after the safeguards decision -- clearly shows the ITC's inability to find imports to be a cause even of material injury when considered alone. *Certain Cold Rolled Steel Products from Argentina, Belgium, Brazil, China, France, Germany, Korea, The Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela*, Inv. Nos. 701-TA-423-425 (Final) and 731-TA-964, 966-970, 973-978, 980, and 982-983 (Final) ITC Pub. 3551 (Nov. 2002); *Certain Cold Rolled Steel Products from Australia, India Japan, Sweden, and Thailand*, Inv. Nos. 73 1-TA-965, 971-972, 979, and 981 (Final) ITC Pub. No. 3536 (Sept. 2002); *Certain Cold Rolled Steel Products from China, Indonesia, Slovakia and Taiwan*, Inv. Nos. 731-TA-831-832, 835, 837 (Final) Pub. No. 3320 (July 2000); and *Certain Cold Rolled Steel Products from Argentina*,

44 Because the ITC did not find each of the five flat rolled steel products to be “like” the imports under investigation, its determination to combine all flat rolled steel products into a single like product and its consequent decision to define the domestic industry by such combination of products is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX of GATT 1994.

45 The United States challenges our approach to flat rolled products in part by reference to the differences of opinion among the Complainants about where the line should be drawn between various products. In doing so, the U.S. raises a red herring. First of all, it should be noted that none of the Complainants suggests that there is only one possible definition of the “like product” for the products at issue in this case, though Japan is of the opinion that the five-product breakdown makes most sense. Ultimately, what matters is whether the ITC’s choice of the CCFRS grouping was reasonable particularly in light of distinctions evident among participants in the U.S. market,³³ including the ITC’s own views concerning those distinctions in previous cases.³⁴ The Panel can make its decision in this case merely by deciding that the broad “flat rolled” category that the ITC chose *does not* reflect the competitive relationship that must exist between products within a like product category. The Panel need not decide which of the breakdowns presented in the Complainants’ submissions is most appropriate; it merely needs to find that what the U.S. did was too broad, which it clearly was.

C. Conclusion

46 The U.S. approach to defining the domestic industry producing the like product was seriously flawed in this case. Application of the relevant factors demonstrates that the individual products within the flat rolled grouping are not like one another, hence they are not appropriately bundled together as a single like product category. The U.S. decision is therefore inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards and Article XIX:1 of GATT 1994.

III. THE U.S. PRESIDENT’S DECISIONS ON TIN MILL AND STAINLESS WIRE PRODUCTS DID NOT MEET THE STANDARDS REQUIRED BY THE AGREEMENT ON SAFEGUARDS

47 The ITC Commissioners were divided three-to-three in their injury votes on four products. The President treated the tie votes on tin mill products and stainless steel wire as affirmative injury determinations and applied measures to those products. The President treated the other two tie votes -- covering tool steel and stainless fittings/flanges -- as negative injury determinations and imposed no measures on these products.

48 According to the United States, this is perfectly reasonable, as it is up to the President to decide in such cases which of the evenly divided groups of Commissioners he deems the views of the Commission “as a whole.” What the United States fails to comprehend is that for the two products where the President chose the affirmative side, the Commissioners did not agree on the

Brazil, Japan, Russia, South Africa and Thailand, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final) Pub. No. 3283 (March 2000) (**Exh. CC-34**).

³³ See e.g., *Korea Alcoholic Beverages*, para. 137.

³⁴ See Japan First Submission, para. 113.

like product definition. The Commission was therefore not, in fact, evenly divided. Furthermore, even if the Panel were to decide that the ITC was in fact, evenly divided, the President still failed to provide an explanation for his decision.

A. Lack of correlation between injury/like product determinations and the measures imposed

49 We first challenge the President's decision to treat the votes on tin mill products and stainless steel wire as evenly divided when, in fact, the Commissioners did not agree on the like product definition for either of these products. To review the decisions again:

- For tin mill products: Two Commissioners considered these products as part of the larger "flat rolled" category and made an affirmative determination with regard to the entirety of flat rolled products. The other four Commissioners considered these products separate like products. Of the four, one Commissioner made an affirmative injury determination and the other three voted negative. Overall, therefore, the vote was tied at three-to-three; but for tin mill as a separate like product, the vote was three-to-one negative.
- For stainless wire products: Two Commissioners considered these products as part of a combined stainless wire and wire rope like product and issued an affirmative determination on these combined products. The other four Commissioners considered them separate like products. Only one of these four, however, made an affirmative determination for stainless wire; the other three voted in the negative. As with tin mill products, therefore, the overall vote was tied at three-to-three for stainless wire; but for stainless wire as a separate like product, the vote was three-to-one negative.

50 The United States claims that none of the Complainants have identified the specific textual violations caused by these decisions.³⁵ This just isn't true. Japan specified in its first submission that U.S. imposition of measures on these two products violated various WTO provisions because the U.S. failed to correlate the injury determination, the like product definition, and the safeguards measure. Under Article 2.1, a Member may apply a safeguard measure only if the Member has determined that increased imports have caused or threaten to cause serious injury to the industry producing the "like or directly competitive" product. Article 4.2(b) states further that an affirmative injury determination cannot be made unless an investigation shows "the existence of a causal link between increased imports of the product concerned and serious injury or threat thereof." Under the plain meaning of these provisions, a safeguard measure cannot be applied to imports of a product without an affirmative injury or threat determination based on an examination of the domestic industry producing the like or directly competitive product. In other words, there must be a one-to-one relationship between the injury determination and the like product definition. In this case, that correlation did not exist for tin mill and stainless wire products.

³⁵ U.S. First Submission, para. 1001.

51 When the ITC's vote is equally divided, the U.S. statute permits the President to treat the votes of either group of commissioners as the determination of the Commission. In this case, the President applied what he believed was his discretion under the U.S. statute to treat the votes on tin mill and stainless wire products as affirmative decisions. The President, however, announced a remedy for tin mill products separate from his remedy for flat rolled products, thereby indicating his agreement with the four commissioners who treated tin mill products as a separate like product. Stainless wire was also necessarily a separate like product because the Commission voted four-to-two that stainless wire rope imports were not injuring the domestic industry. As such, the President's reliance on tie votes that did not correspond to the separate like product definitions with which he implicitly agreed violates Articles 2.1 and 4.2(b). The measure is not supported by affirmative injury determinations on the tin mill and stainless wire product categories themselves.

52 Although the United States tries to justify its internal decision-making by citing the ITC's practice of aggregating the mixed votes of individual commissioners, the case the United States relies upon -- *U.S. – Line Pipe* -- is inapplicable to the present case. The part of the *Line Pipe* decision to which they refer involved the aggregation of affirmative decisions, some of which were based on current serious injury, some of which were based on threat of serious injury. The Appellate Body found that the U.S. Government was not required to issue a discrete determination either of serious injury or threat of serious injury. This makes sense because the result of continued current serious injury and threat of serious injury determination is the same either way: an affirmative determination supporting the application of safeguard measures, based on the same like product definition. In other words, there was no inconsistency. In this case, however, the ultimate result -- whether affirmative or negative -- was clearly affected by aggregating the votes based on different "like product" definitions. Hence, *Line Pipe* is entirely irrelevant to this issue.

53 The United States claims that because Commissioners Bragg and Devaney made affirmative determinations for a broader flat rolled like product, they necessarily found the same for each individual sub-component of the like product, including tin mill products.³⁶ This is yet again an example of the sloppy approach the United States takes to its increased imports, serious injury, and causation analyses. Unless these end products are broken down and the analysis performed for each one, how can they say that the same result would apply to each product?

54 Nonetheless, they also say that Commissioner Devaney specifically stated that his analysis applies to all products within his flat rolled like product grouping.³⁷ This is wrong. Commissioner Devaney was speaking only about the question of whether the industry was seriously injured, not whether such injury was caused by imports broken down by each of the flat rolled products.

55 The same is true for stainless wire. Neither Commissioner Bragg nor Commissioner Devaney did the work necessary to determine if their decision could have been the same for

³⁶ *Id.* para. 985.

³⁷ *Id.* para. 986, *citing* ITC Report at 50, n.186.

stainless wire broken apart from stainless wire rope. Without the benefit of complete analysis on each product, we cannot know their position.

56 The United States is therefore asking that the Panel to accept a measure that was applied based on the affirmative injury determination of a single Commissioner -- Commissioner Miller for tin mill and Commissioner Koplan for stainless wire. Given the repeated U.S. statements in this dispute that the ITC -- meaning six Commissioners -- is the "competent authority" in the United States, we fail to see how a single Commissioner, finding no agreement among the other five, and therefore representing a small minority of views, can represent the views of the Commission "as a whole." Furthermore, we do not believe such a minority view, challenged by an overwhelming majority, can be considered a "reasoned and adequate" explanation, as the jurisprudence requires to justify imposing a safeguard measure.

B. The President also failed to provide an explanation for his decision

57 Even assuming the President's treatment of the ITC's tin mill and stainless wire products decisions as "equally divided" was legitimate, he treated these "tie" votes as positive determinations, while treating others as negative determinations, without any explanation. This violated Articles 3.1 and 4.2(c) of the Agreement on Safeguards

58 Article 3.1 requires authorities to publish a report "setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) requires authorities to publish promptly "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

59 The United States claims that because the ITC is the competent authority under U.S. law, then as long as the ITC complied with these provisions, the President does not need to do anything further *even if he disagrees with a majority of the Commissioners*. However, under the WTO Agreement, if the President disagrees with the ITC's analysis, then he effectively takes the role of the competent authority within the meaning of Article 3.1 of the Agreement on Safeguards, because his decision becomes the injury determination of the United States. Therefore, under such circumstances, the President must abide by Articles 3.1 and 4.2(c) and any other obligations applicable to competent authorities.

60 Put another way, the structure of the U.S. decision making processing does not relieve the United States of its WTO Obligations. Thus, anytime the President makes a decision that departs from or lacks an ITC majority -- as with tin mill and stainless wire -- then he must provide an explanation for the decision as the competent authority. In this case, the President provided no explanation as to why he agreed with those Commissioners voting in the affirmative for tin mill and stainless wire, while agreeing with those voting in the negative for tool steel and stainless flanges and fittings. One might guess that the President implicitly adopted the report of the side with which he agrees. But here, there were more than two reports. For tin mill and stainless wire products there were four different reports, three of which supported affirmative decisions but which disagreed on like product.

61 It is impossible, therefore, to know with whom the President agreed. The President, as a competent authority, failed to state which of the Commission's multiple reports he adopted.

Under Article 3.1, the President failed to identify which report “set[s] forth the findings and reasoned conclusions reached on all pertinent issues of law and fact.” He therefore also failed, as required by Article 4.2(c), to provide “a detailed analysis of the case under investigation as well as a demonstration of the factors examined.”

62 The United States seems to misunderstand our arguments in this regard.³⁸ Complainants understand the U.S. system, as we have all had plenty of experience trying to defend ourselves within that system. The problem is that the United States has difficulty viewing its WTO obligations outside the context of U.S. law and practice. The United States seems to assume blindly that their practice is inherently acceptable under the WTO Agreements when it often is not.

Permitting the President to designate the determination of the ITC in the case of a divided vote is part of the U.S. internal process for deciding what is the determination of the competent authorities. The Safeguards Agreement does not contain an obligation on this process.³⁹

This is the smoking gun. The United States is effectively saying that when the Commission is divided, there is no competent authority and the President has no separate responsibility. This cannot be true. WTO Agreements are meant to be followed by the Members of the WTO. The U.S. interpretation would essentially give Members *carte blanche* to ignore their obligations, as long as they construct a process in which their so-called “competent authorities” do not make the final injury determination.

63 In this case, the ITC failed to reach a majority, and issued multiple reports. As there were three separate reports supporting affirmative determinations for tin mill and stainless wire products, there was no report that could be viewed as representing the views of “the ITC as a whole”, as the United States puts it.⁴⁰ Without such a report, the U.S. Government did not fully observe Articles 3.1 and 4.2(c).

C. Conclusion

64 To conclude, the U.S. violated its obligations under the Agreement on Safeguards in its treatment of evenly divided ITC votes when it: (a) failed to correlate its injury and like product determinations with the measures imposed; and (b) failed to have the President provide an explanation for his decisions.

³⁸ *Id.* paras. 1012-1017.

³⁹ *Id.* at para. 1013.

⁴⁰ *Id.* at para.1017 (last sentence).

IV. THE ITC'S CCFRS LIKE PRODUCT DEFINITION AND THE PRESIDENT'S DECISION TO IMPOSE MEASURES ON TIN MILL AND STAINLESS WIRE PRODUCTS ALSO VIOLATE ARTICLE X:3 OF GATT 1994

65 The United States seeks to attack Japan's claims under GATT Article X:3(a) with the erroneous contention that Japan's arguments support particular outcomes and, thus, are substantive. In the view of the United States, a "substantive" argument or an argument concerning the application of a "substantive" law or regulation cannot be brought under Article X:3.

66 To support its argument, the United States relies on the declaration of the panel in *Argentina-Bovine Hides* that Article X:3(a) only covers measures that are administrative in nature.⁴¹ The United States is incorrect. To the extent that the *Bovine Hides* panel implied that a measure was either administrative (procedural) or substantive, Japan believes this to be erroneous and unsupported by any Appellate Body precedent. That a substantive measure can be administered in a manner that is not uniform, impartial and reasonable is self-evident. Indeed, GATT Article X:3(a) is meant to address and prevent precisely this type of procedural protectionism.⁴²

67 The United States compounds its error with a stunning misinterpretation of the application of customary principles of international law in WTO disputes. According to the United States, in *Shrimp*, the Appellate Body distinguished between "certain minimum standards of transparency and procedural fairness," which were within the purview of Article X:3(a), and "alleged due process concepts that are not expressly provided."⁴³

68 Indeed, the United States goes so far as to claim that the customary international law principles of good faith and *abus de droit* are not applicable to GATT Article X:3(a).⁴⁴ This contention is expressly contradicted by the declaration of the Panel in *Korea – Procurement* that principles of customary international law apply to WTO provisions unless they are explicitly excluded by the text of a WTO Agreement.⁴⁵ Moreover, in its prior decisions, the Appellate

⁴¹ *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R Report of the Panel 19 Dec. 2000 at para. 11.70.

⁴² The erroneous nature of the U.S. argument is also illustrated by the Panel and Appellate Body reports in *United States – Underwear*. There, the Panel and Appellate Body said that the administrative (procedural) obligations of GATT Articles X:1 and X:2 applied in the context of a textile safeguard restraint measure (a substantive measure). *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R (10 February 1997) at pp. 20-21, and WT/DS24/R (8 November 1996) at paras. 7.64-7.66. Though Article X:3(a) embodies a different administrative (procedural) obligation than Articles X:1 and X:2, like them it applies that administrative (procedural) obligation to substantive measures of general application.

⁴³ U.S. First Written Submission, paras. 1292-93, citing *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R Appellate Body Report 12 Oct. 1998 at para. 183.

⁴⁴ *Id.* at para. 1295.

⁴⁵ *Korea – Measures Affecting Government Procurement*, WT/DS163/R Report of the Panel 1 May 2000 at para. 7.97 (decision not appealed).

Body has declared both that the demands of due process are implicit in the DSU⁴⁶ and that the principle of good faith indeed informs the WTO Agreement in general.⁴⁷

69 In light of this, it is indisputable that the international law principles of due process and good faith are embedded in GATT Article X:3(a). Thus, in analyzing how the U.S. administered its safeguard law in this dispute, the Panel should examine the U.S. conduct closely, with an eye to whether the United States administered its law in a way that respected its due process and good faith obligations.

70 The final flaw in the U.S. effort to counter Japan's Article X:3(a) claims is its attempt to justify the challenged action on the ground that uniform, impartial, and reasonable administration of laws requires different outcomes because of different facts.⁴⁸ As Japan asserted in its response to Panel Question 134:

The United States must administer its safeguard law in a uniform, impartial and reasonable manner. The same standards must be applied in every instance. When applied to different facts, the outcome may differ. However, different outcomes when faced with the same or highly similar facts do not meet the requirements of Article X:3(a).

71 With respect to the ITC's like product analysis, the United States argues that the ITC did not apply the same legal standard and reached different conclusions in this proceeding because of different facts from the prior proceedings cited by Japan. In reality, the ITC ignored innumerable findings in past AD/CVD proceedings. Plate, hot rolled, cold rolled, and corrosion resistant steel have each traditionally been treated as separate like products by the ITC in other recent trade remedy cases -- one of them, on cold rolled steel, as recent as March 2000, and another, on hot rolled, in August 2001. This is not the appropriate imposition of a uniform legal standard to varying facts. Rather, it is administration of the safeguard law in a manner that is not uniform, impartial and reasonable, thereby contravening GATT Article X:3(a).

72 The propriety of basing a violation of Article X:3(a) on dissimilar treatment of the like product issue in this proceeding compared with prior AD/CVD proceedings is clearly explained in Japan's answer to Panel Question 136:

The safeguards law, like the anti-dumping and countervailing duty laws, is a trade remedy law. Although the standards are not identical, the basic purposes of the laws are similar. Of particular importance, all three laws focus on the economic effect of imports on the competing domestic industry producing like or

⁴⁶ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R Appellate Body Report 19 December 1997 at para. 94.

⁴⁷ *United States – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R 24 July 2001 at para. 101; and *United States – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R 24 February 2000 at para. 166.

⁴⁸ U.S. First Written Submission at para. 1290.

substitutable/directly competitive/similar products. Thus, given the similarities, decisions regarding like products in the context of one of these trade remedy laws are highly relevant to analyzing the uniform application requirement of Article X:3(a).

73 The United States seeks to bolster its contention that Article X:3(a) does not require uniform administration between different laws with an absurd example – alleging that acceptance of Japan’s position would require a public health law to have identical product scope as a tariff law.⁴⁹ To equate this example, which involves *wildly disparate* laws, with application of a differing legal standard in laws that are *exceedingly similar* is ludicrous.

74 The United States claims that Japan ignored the 1984 steel safeguards case in which the U.S. combined various flat rolled products into a single like product. By making this argument, they are basically saying that the ITC used a flawed like product analysis not once, but twice -- both in 1984 and 2002 (though, importantly, even the 1984 ITC didn’t conceive of collapsing slab with finished flat products). If the 1984 case proves anything, it is the ITC’s proclivity to bend over backwards to provide broad safeguard relief to the U.S. steel industry. This should be stopped, now that we have an effective mechanism in the Agreement on Safeguards to prevent such abuse. The fact is that the ITC applied its factors reasonably in the 1993-94 AD and CVD cases and found distinct delineations between the various finished flat products. In the 2002 safeguards case, it cast its traditional factors aside in favor of vertical integration in order to blur clear product distinctions in favor of overbroad relief. This should not be allowed. The U.S. should be required to administer its laws with respect to like product in a uniform, impartial, and reasonable manner.

75 Still, the U.S. violation of Article X:3 with respect to like product is not limited to the lack of uniformity vis-à-vis these past cases, but within this very case itself. As discussed above, while the ITC lumped semi-finished flat steels -- or slabs -- into the same like product as finished flat steels, it decided to treat semi-finished long products and semi-finished stainless products as separate like products, apart from finished products. Carbon billets, which bear the same relationship to carbon long products as does carbon slab to carbon sheet products in that both are the input for further rolling into the next stage product, were found to be a separate like product from finished long products. Stainless slab, which bears the identical relationship to stainless plate and other flat rolled products as carbon slab bears to finished carbon flat products, was found to be a different like product than stainless plate and other flat rolled stainless products. Likewise, within the flat rolled category, although both tin mill products and corrosion resistant products use a cold rolled substrate, they were treated as separate like products. Such treatment was not uniform, reasonable or impartial.

76 With respect to the President’s measures on tin-mill and stainless wire, the violation of Article X:3(a) is attributable to the way in which the President treated the affirmative votes of individual Commissioners based on differing views about the proper scope of the like product definitions. Absent a common basis for the affirmative votes, the United States cannot contend that the President administered the law in a uniform, impartial and reasonable manner.

⁴⁹ *Id.* at para. 1304.

77 The United States asserts that: (1) all Commissioners rendered a determination that included tin mill and stainless wire; (2) U.S. law provides no limitations on the President's ability to consider divided ITC determinations as affirmative or negative; (3) a U.S. court recently determined that this practice was consistent with U.S. law; and so (4) there is no violation of GATT Article X:3(a).⁵⁰

78 The U.S. position should be rejected. In addition to the legal flaw that consistency with WTO obligations is not dependent on a domestic court's declaration that action is consistent with a domestic law, the U.S. argument is, in essence, that the absence of standards and criteria in a law renders it impossible to find that the law was administered in a non-uniform, partial and unreasonable manner. To the contrary, the unfettered ability to apply different standards is as massive a violation of the requirements of GATT Article X:3(a) as can be imagined. The treatment of some so-called tie votes as affirmative and others as negative is not only obviously non-uniform but also partial and unreasonable, particularly without any explanation from the President, as the competent authority, as to why he made inconsistent decisions. Furthermore, the decision to rely on three affirmative votes when only one of those votes agreed with the President's like product delineations is clearly unreasonable.

79 For all of the reasons set out above and in Japan's First Submission and other submissions in this proceeding, the Panel should find that the United States violated its obligations under GATT Article X:3(a).

V. THE UNITED STATES MISCONSTRUES THE INCREASED IMPORTS STANDARD IN A MANNER THAT WOULD EVISCERATE THE APPELLATE BODY'S RULING IN ARGENTINA-FOOTWEAR

80 The United States asserts that the issue of increased imports is not a separate inquiry in a safeguard investigation, but can be addressed "as competent authorities proceed with the remainder of their analysis."⁵¹ In effect, the United States argues that the increased import requirement -- set forth in Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994 -- is merely a component of the causation analysis required under Article 4.2(b) of the Agreement on Safeguards.⁵²

81 As discussed below, the U.S. misconstrues the texts of the agreements and Appellate Body jurisprudence. The treaty text is unambiguous, its treatment by the Appellate Body is straightforward, and its proper application in this case demonstrates that the United States failed to meet the threshold requirement of increased imports with respect to CCFRS. Indeed, the requirement is not satisfied whether one considers CCFRS as a single like product, or more appropriately as separate like products, including slab, plate, hot rolled, cold rolled and corrosion-resistant products.

⁵⁰ See *id.* at paras. 1306-1315.

⁵¹ U.S. First Submission at para. 177.

⁵² *Id.*

A. The Increased Imports Requirement Includes Both Temporal And Comparative Elements That Must Be Satisfied As A Threshold Matter Before A Measure May Be Imposed

82 The panel in *Argentina – Footwear* found that the increased imports requirement is a “basic prerequisite” for the application of a safeguard measure.⁵³ The Appellate Body did not dispute this finding. As interpreted by the Appellate Body in *Argentina – Footwear*, the provisions of Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX(a) of the GATT 1994 stand for the proposition that increased imports must be “sudden and recent.”⁵⁴ Thus, the requirement has a temporal element. Moreover, increased imports must be “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten ‘serious injury’” to the domestic industry producing the like product under investigation.⁵⁵ This second element indicates that a comparison is required, not so much to determine the *effect* of increased imports in a causal sense, but to determine the *existence* of increased imports in light of the relative trends in imports. The comparison is made between recent import trends, which are at the heart of the increased imports inquiry, and import trends over the entire period of investigation. It serves as a litmus test to determine if an emergency exists and, therefore, if emergency action is required. The failure to establish either one of these elements renders a safeguard measure invalid.

1. The Temporal Element

83 Under Article 2.1 of the Agreement on Safeguards, a Member may not impose a safeguard measure on imports absent the existence of increased imports. The same requirement is embodied in GATT 1994 Article XIX:1(a). This requirement is stated in the present tense - - “such product *is being imported*” (emphasis added) -- indicating that the increase in import volume must be presently occurring or in a recent period but not in the past. The Appellate Body has found this language to mean:

... that it is necessary for the competent authority to examine recent imports, and not simply trends in imports during the past five years -- or, for that matter during any other period of several years. In our view, the phrase ‘is being imported’ implies that the increase in imports be *sudden and recent*.⁵⁶

The Appellate Body even emphasized that the relevant investigation period in which to find increased imports “should not only *end* in the very recent past, the investigation period should *be* the recent past.”⁵⁷ Indeed, the panel in *U.S. -- Line Pipe*, in consideration of *Argentina –*

⁵³ *Argentina – Footwear* (Panel Report) at para. 8.138.

⁵⁴ *Argentina Footwear* at para. 130.

⁵⁵ *Id.* at para. 131.

⁵⁶ *Id.* at para. 130.

⁵⁷ *Id.* at para. 130, n.130 (emphasis in original).

Footwear, found that an important aspect of the validity of an investigation period for discerning increased imports is that it allows the competent authority “to focus on the *recent* imports.”⁵⁸

84 The United States contends that the emphasis on recent imports can only be understood in light of the Appellate Body’s findings in *U.S. – Lamb Meat*. According to the United States, the fact that the Appellate Body cautioned that an investigation period should be longer than 21 months demonstrates that the increased imports requirement can be met even with an increase occurring in the more distant past.⁵⁹ But the language relied upon by the United States does not address the temporal element of the increased imports requirement. Rather, the Appellate Body was addressing the appropriate length of period for assessing the state of the domestic industry.⁶⁰

85 The United States also contends that the panel’s findings in *U.S. – Line Pipe*, which sought to apply the Appellate Body’s holding in *Argentina – Footwear*, vindicates its reading of the increased imports requirement as allowing a finding of increased imports in the more distant past. We do not contest the panel’s interpretation of the Appellate Body’s holding in *Argentina – Footwear* in as much as the panel reasoned that the increased imports requirement does not require an analysis of the conditions *immediately* preceding the authority’s decision. Nor, as the panel noted, does it require that the analysis focus *exclusively* on conditions at the *very end* of the period.⁶¹ The specific facts of that case were such that the panel considered that a slight and brief decrease of absolute imports at the very end of the investigation period would not preclude a finding of increased imports, where they remain at high levels and there is still a relative increase of imports.⁶² But the panel’s holding did not obviate the requirement that the increase be recent, nor does it suggest that the most recent period is unimportant. It merely reinforced the Appellate Body’s holding in *Argentina – Footwear* that an authority must consider import trends over the entire period of investigation.⁶³

86 The panel’s holding in *U.S. – Line Pipe* must be viewed in light of the facts in *Argentina – Footwear*. The very near term decline in imports noted in *U.S. – Line Pipe* was in contrast to the situation *Argentina – Footwear*, where the imports declined “continuously and significantly” over a longer period.⁶⁴ In this sense, *Argentina – Footwear* does provide a benchmark for ascertaining a “recent” increase. Where there is a sustained decline over a period of years – in this case over two years – increased imports cannot be considered “recent.” U.S. arguments suggesting otherwise cannot be reconciled, in particular, with the facts and holding in *Argentina – Footwear*.

⁵⁸ See *U.S. – Line Pipe* (Panel Report) at para. 7.201 (emphasis added).

⁵⁹ U.S. First Submission at paras. 185-188.

⁶⁰ *U.S. – Lamb Meat* at paras. 137 and 138.

⁶¹ *Id.* para. 7.204.

⁶² *Id.* paras. 7.210 and 7.213.

⁶³ Indeed, the panel clearly indicated that the most recent period was critical to the analysis and that consideration of import trends relative to that recent period was also important. The panel specifically found that: (1) the ITC’s five-year period of investigation was consistent with the *Agreement on Safeguards* because “the period selected by the ITC *allows it to focus on the recent imports*”; and (2) that “the period selected by the ITC is sufficiently long to allow conclusions to be drawn regarding the *existence* of increased imports.” *U.S. – Line Pipe* (Panel Report) at para. 7.201 (emphasis added).

⁶⁴ *Argentina – Footwear* (Panel Report) at para. 8.162 (emphasis added).

87 Ultimately, the temporal element of the increased imports requirement should be understood within the context of the purposes of safeguard measures, that is “emergency action” against a product that “is being imported...in such increased quantities and under such conditions as to cause...serious injury.” Clearly, the fact that the increase is expressed in the present tense would indicate that the increase would have to be recent and not something in the past. The word “emergency” is defined as “a situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action; a conditions requiring immediate treatment,”⁶⁵ implying something that has also happened quickly or suddenly. If the increase is not sudden and recent, the emergency situation contemplated by GATT Article XIX and the Agreement on Safeguards does not arise and a safeguard measure cannot be imposed.

2. The Comparative Element

88 There is also a comparative element associated with the increased imports requirement that serves as a litmus test to determine if an emergency exists, and therefore emergency action under Article XIX is warranted. As the Appellate Body has noted, not just any increase in imports suffices. Article 2.1 requires that the product concerned be imported “in *such* increased quantities and under such conditions *as to* cause or threaten to cause serious injury” (emphasis added). The increase in imports must be “such” as -- that is, sufficient -- to cause or threaten serious injury to the domestic industry producing the like or directly competitive product.

89 The specific provisions of Article 4.2(a) help focus the inquiry. Article 4.2(a) requires that “the *rate* and *amount* of the increase in imports . . . in absolute and relative terms’ (emphasis added) must be evaluated.”⁶⁶ In considering these points, the Appellate Body in *Argentina – Footwear* held:

{I}t is not enough for an investigation to show simply that imports of the product are more this year than last year - or five years ago. Again, and it bears repeating, not just any increased quantities of imports will suffice. There must be “such increased quantities” as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause “serious injury.”⁶⁷

Accordingly, for the increased imports requirement to be met, an authority must analyze import trends over the entire period of investigation and find that there is an increase in import volume

⁶⁵ The New Shorter Oxford English Dictionary (1993) at 806.

⁶⁶ *Argentina – Footwear* at para. 129.

⁶⁷ *Id.* at para. 131.

that is “recent enough, sudden enough, sharp enough, and significant enough” to cause or threaten to cause serious injury.⁶⁸ The question is how this litmus test is conducted.

90 Contrary to U.S. arguments, we are not arguing that an absolute standard exists for determining whether imports are recent, sudden, sharp, and significant in a causal sense.⁶⁹ We embrace the Appellate Body’s notion that determining how recent, sudden, sharp or significant the increased imports must be is not a “mathematical or technical determination.” A competent authority, such as the ITC, may not walk away from the analysis and declare that increased imports exist, for example, simply because imports have increased by some negligible amount over the period of investigation. This is because, as discussed above, there are quantitative and qualitative judgments to be made regarding the *existence*, as opposed to the *effect*, of increased imports.

91 Because the comparative element of increased imports requires both a quantitative and a qualitative judgment, there must be some examination of the relative trends in imports over the period of investigation in terms of their nature, extent, and magnitude vis-à-vis the *recent* imports. It is similar to the point the Appellate Body made in *Lamb Meat* regarding serious injury -- that the real significance of short term trends at one point in a period of investigation “may only emerge when these short term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation.”⁷⁰ The point is to consider trends in context, in comparison with longer-term trends. Undertaking such an analysis is separate from the issue of causation, which concerns the “effect” of the increase.

92 That this is a separate analysis from causation is confirmed by the fact that the Appellate Body in *Argentina – Footwear* treated the two issues separately. It devoted a distinct section to its discussion of increased imports, and then addressed serious injury and causation in a separate section of its report.⁷¹ If the Appellate Body considered the increased imports requirement as part and parcel of the causation requirement, it would have said as much or, at the very least, it would not have separated the analyses.

93 This treatment by the Appellate Body indicates that an authority must decide, as a threshold matter, based on the data over the course of the investigation period, whether an emergency exists -- whether, given the facts, the increase is “enough.” This is why the Appellate Body emphasized that an authority must examine recent imports and imports over the entire period of investigation.⁷² It is also why the panel in *U.S. – Line Pipe* found that the period selected by an authority must be such that it “allows it to focus on the recent imports,” and also that the period selected be “sufficiently long to allow *conclusions to be drawn* regarding the *existence* of increased imports.”⁷³ It is important to remember that the conclusions referred to by

⁶⁸ *Id.* at para. 131.

⁶⁹ U.S. First Submission at para. 177.

⁷⁰ *U.S.-Lamb Meat*, para. 138.

⁷¹ The Appellate Body addressed increased imports at paras. 125-131 under the heading “Increased Imports.” It then discussed serious injury at paras. 132-139 under the heading “Serious Injury.” Finally, it addressed causation at paras. 140-147 under the heading “Causation.”

⁷² *Argentina – Footwear* at para. 130.

⁷³ *U.S. – Line Pipe* (Panel Report) at para. 7.201 (emphasis added).

the panel in *U.S. – Line Pipe* are not part of the causation analysis required by Article 4.2(b). They are not conclusions on the *effect* of increased imports, but on the *existence* of increased imports.

B. Import Trends For CCFRS Fail The Increased Imports Requirement

94 Given the discussion above, if increased imports appeared, for example, two or more years in the past, it would be difficult to find that the increased imports were recent in a temporal sense, particularly in light of the facts in *Argentina – Footwear*. Assuming, *arguendo*, that the increased imports could be deemed recent, the question still remains whether they are recent enough, sudden enough, sharp enough, and significant enough. This is when a review of recent imports and import trends over the entire period becomes important. A competent authority cannot view the increase two or more years ago in a vacuum. This would contravene the Appellate Body’s guidance that import trends over the period of investigation and intervening trends be considered. While this does not require that imports be increasing right up to the date of determination, it does require some assessment of the increased imports relative to the most recent trends and trends prior to the occurrence of the increase.

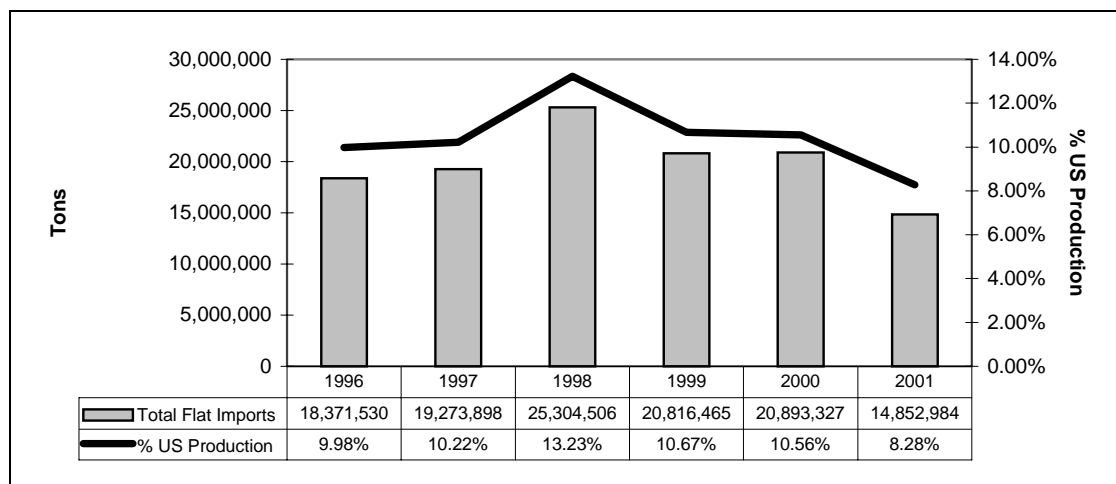
95 This idea is captured in the panel’s analysis in *Line Pipe*. As the panel noted, “there can still be a ‘recent’ increase even if that increase has ceased prior to the date of determination, provided imports remain at a *sharply increased level*.”⁷⁴ We point out, yet again, that the panel was not addressing causation when it discussed the requirement that imports remain at a sharply increased level. Rather, it was simply comparing the most recent imports with imports during the period in which increased imports first occurred. The analysis also involves considering trends prior to the occurrence of “increased imports.” This comprises the relational element of the increased imports requirement. In essence, what the panel was saying is that if the imports do not remain at a sharply increased level, relative to trends prior to the occurrence of increased imports, then they are not sharp enough.

96 Applying this understanding to the facts of this case, imports of CCFRS, whether grouped together as one like product or considered more appropriately as distinct like products, fail the increased imports requirement. One need only look at the data before the ITC and the President to reach this conclusion.

97 Looking at CCFRS as one like product, the data reveal a decline in imports from 1998, the year in which increased imports were found to occur. In the context of the facts considered by the Appellate Body in *Argentina – Footwear*, it is unclear how the ITC found the increase to be recent in a temporal sense. As in *Argentina – Footwear*, imports of CCFRS witnessed a steady decline over a substantial period of time from the occurrence of increased imports. Moreover, if one considers the increase in imports in 1998 to be sharp and significant, there is no basis for finding that the increased imports remain sharp enough or significant enough to warrant emergency action. As the Panel noted in *Line Pipe*, there need not be a sustained increase in imports up until the determination is made, as long as imports remain at a sharply increased level. In this case, there is no basis for arguing that CCFRS imports remained at a sharply increased

⁷⁴ *Id.* at para. 7.208.

level if that level is defined, as it was by the ITC, by the increase reflected in 1998, which arguably does reflect a sudden, sharp and significant increase over 1996 and 1997. The imports in fact returned to levels prior to the occurrence of increased imports. Thus, the increased imports are not recent, nor are they recent enough, sudden enough, sharp enough or significant enough to warrant the measure. Rather, as is evident from the figure below, imports have been decreasing continuously and significantly since 1998, down well below the 1996 level by end of year 2001.



Total Flat Imports (Aggregate of Slab, Plate, HR, CR, Coated) and as Percent U.S. Production⁷⁵

98 One reaches the same conclusion after applying the analysis separately to each of the individual finished flat products. Indeed, by 2001 even slab imports declined to below levels witnessed in 1996.⁷⁶ Moreover, the U.S. industry, of course, is responsible for all slab imports, which must weigh on the decision to impose a measure. In particular, slab is purchased by domestic finished steel producers (including the integrated mills) and benefits those mills by allowing them to compete in downstream markets. This is vastly different from the presumed effect of finished steel imports on the industry. If slab is removed from the graphic above, the trends become even more pronounced and further disprove the existence of increased imports in this case.

99 For plate, imports declined from the increase year of 1998 by roughly 57 percent in 1999 and remained flat and also below trends prior to the increase year for the remainder of the period. Indeed, relative to domestic production, the volumes continued to decline into 2001.⁷⁷ Under the circumstances, any increase in plate imports cannot be deemed recent or recent enough, sudden enough, sharp enough or significant enough to warrant a measure.

100 Hot rolled imports increased by roughly 76 percent in 1998 before declining back to 1997 levels in 1999. A modest increase in 2000 was capped by a more than 50-percent decline in imports in 2001⁷⁸ -- a decline that was captured by the data available to the ITC and the data available to the President. Under the circumstances, hot rolled imports cannot be deemed recent, much less recent enough, sudden enough, sharp enough or significant enough to warrant a measure.

⁷⁵ See Japan First Submission ANNEX A.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

101 Cold rolled steel imports also spiked in 1998, then steadily declined through 2000 by roughly 30 percent. An increase in imports witnessed in 2001 left import volumes at levels, both absolute and relative to domestic production, below 1997 levels.⁷⁹ Trends in cold rolled steel imports reflect the scenario offered by the Panel in Question 44 of its questions to the parties -- namely the relevance of an increase preceded by a decrease in imports. The jump in cold rolled imports from 2000 to 2001 reflects, in the abstract, an absolute increase of 11 percent. Imports jumped two percentage points relative to domestic production during the same period.⁸⁰ But this increase, alone, is not sufficient to justify a measure. The increase must be viewed in light of the import trends over the entire period and the most recent period. First, the imports increased only after falling precipitously from much higher levels in 1998 (the ITC's increase year) relative to levels in 1996 and 1997.⁸¹ Moreover, the recovery in imports in 2001 represents a level of imports that actually falls between levels in 1996 and 1997 (before the ITC's increase year). In this sense, the increase between 2000 and 2001 might be viewed as sharp, but not significant in light of all the trends over the entire period. Under the circumstances, even if one viewed an increase in cold rolled steel imports to be recent, they cannot be deemed recent enough, sudden enough, sharp enough or significant enough to warrant a measure.

102 Finally, corrosion resistant steel imports are distinguished by the fact that they were remarkably flat throughout the ITC's entire period of investigation. Indeed, imports in 1998 actually declined from 1997 in both absolute and relative terms. An increase in 1999 was followed by steady declines into 2001 to levels below the beginning of the period. Thus, although the "increase" in corrosion resistant steel imports might be viewed as more recent than the other finished flat products, this only addresses recent in the temporal sense. The imports were still not recent enough, sudden enough, sharp enough or significant enough to warrant a **measure**.

C. Conclusion

103 For the reasons discussed above, the U.S. safeguard measure on CCFRS does not meet the increased imports requirement. Therefore, emergency action under Article XIX of *GATT 1994* and the Agreement on Safeguards was not warranted.

VI. **THE UNITED STATES FAILED TO ENSURE BOTH THAT THE RELATIONSHIP BETWEEN INCREASED IMPORTS AND AN INDUSTRY'S INJURY IS GENUINE AND SUBSTANTIAL AND THAT THE EFFECTS OF OTHER CAUSES ARE NOT ATTRIBUTED TO IMPORTS**

104 The ITC clearly has yet to reconcile its analytic framework -- or lack thereof -- with the causation standard as set forth in the Agreement on Safeguards and as clarified by the Appellate Body. This is now the fourth U.S. safeguard measure to be disputed before the WTO, the three prior challenges were successful and there is nothing substantively new about Co-Complainants' claims on this matter to set it apart from the three prior disputes. The only difference is that more countries are upset this time.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Japan First Submission ANNEX A.

105 Ultimately, the U.S. argument can be reduced to one simple objective: preserving the status quo at the ITC, whose treatment of causation has consistently been found flawed by the WTO Appellate Body: the ITC's approach does not ensure a proper analysis of causation as demanded by the Agreement on Safeguards and as clarified by the WTO Appellate Body. Indeed, so superficial is the ITC's treatment that, in light of the ITC's conclusions in this case, one wonders if it can be considered an "approach," or "analysis" or a "methodology" at all. The United States is basically saying "trust us -- we know what we are doing." With all due respect, the Agreement requires more.

A. The Causation Requirement Demands Both A Compelling Basis For Finding A Causal Link Between Increased Imports And Serious Injury And A Reasoned And Adequate Explanation Of How Non-Attribution Was Effectuated

106 There is an obvious disagreement between the United States and Japan regarding the causation requirement under the Agreement on Safeguards. While often citing the same Appellate Body jurisprudence, the United States evidently believes that the causation requirement applies only limited obligations on a Member before imposing a measure, and that the ITC's approach is more demanding and rigorous than required. This flawed view is based on an erroneous reading of the Agreement and Appellate Body jurisprudence, as well as a failure to appreciate fundamental economic relationships and principles.

107 In its first submission, Japan laid out the framework for a proper causation analysis under the Agreement on Safeguards, describing the relationship between Article 2.1, which requires increased imports be a cause of serious injury to the domestic industry before a Member may impose safeguards measures, and Article 4.2(b), which requires an authority demonstrate "the existence of the causal link between increased imports...and serious injury or threat thereof" on the basis of "objective evidence." The second sentence of Article 4.2(b) goes on to impose a non-attribution requirement, stating that "{w}hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

108 Under the plain meaning of the Agreement text, and with clarification by the Appellate Body, a two-step analysis is envisioned. First, at a minimum, the authority must establish a coincidence of, or at least some compelling correlation between, increased imports and serious injury.⁸² But while a correlation between increased imports and serious injury is relevant and necessary, it is by itself insufficient evidence for imposing safeguards measures. The second sentence of Article 4.2(b) recognizes that other factors may be causing declines in domestic industry performance. Thus, authorities must take the added step of investigating other possible causes, and the injury from those alternative causes "shall not be attributed" to imports. A reasoned and adequate explanation must be offered, explicitly establishing how this was accomplished.⁸³

⁸² See *Argentina – Footwear* at paras. 144-45 (emphasis in original) (quoting *Argentina – Footwear* (Panel Report) at para. 8.238).

⁸³ See *U.S. – Wheat Gluten*, at para. 70; *U.S. – Line Pipe* at para. 217.

109 The ITC's report fails to live up to these requirements. U.S. arguments to the contrary try to distract the Panel from this obvious conclusion, but ultimately these arguments fail.

B. The United States Failed To Demonstrate A Genuine And Substantial Causal Link Between Increased Imports Of Flat Rolled Steel Products And Serious Injury To The Domestic Industries Making the Like Products

110 The United States attempts to distract the Panel by suggesting that Complainants propose that imports must be the sole cause of serious injury under Article 4.2(b).⁸⁴ Japan never made such an argument. Japan recognizes that there can be some interplay of factors, but it also appreciates that imports must contribute *substantially* to bringing about serious injury. After all, the causation standard under the Agreement on Safeguards is more than a contributory cause standard. As the Appellate Body noted in *U.S. -- Wheat Gluten*, there must be a "*genuine and substantial relationship* of cause and effect between increased imports and serious injury."⁸⁵ This is precisely why establishing a causal link, including a correlation between increased imports and serious injury, as well as performing an adequate non-attribution analysis, is necessary.

111 The ITC's "substantial cause" test is flawed because the ITC only compares the importance of increased imports versus each other individual cause to see if imports are important and no less than any other cause. This is done without any real analysis of whether increased imports are truly a genuine and substantial cause relative to the combined effect of the other factors. Indeed, in Japan's view, an authority can not make this distinction absent an effective non-attribution analysis.

112 In any event, even before an authority addresses the question of other causes and non-attribution, it must establish the initial basis for finding a genuine and substantial causal link -- that is, a coincidence between increased imports and a decline in the relevant industry performance factors. In our view, the ITC failed even to establish this threshold causal connection. The U.S. response is that Japan and other Complainants focused on an overly narrow time period to make their case. The United States also suggests that Japan and others relied on an examination of a "limited and selective" set of industry trends to make the case that no coincidence or correlation existed.⁸⁶ These claims are misplaced.

113 Japan's arguments consider the entire period of investigation, but the analysis must begin with the period in which the increased imports occurred. Interpreting the first sentence of Article 4.2(b), the Appellate Body in the *Argentina -- Footwear* dispute stated that if causation is present, increased imports "normally should coincide" with a decline in the relevant injury factors.⁸⁷ The term "coincide" implies a very tight correlation between increased imports and injury within a

⁸⁴ U.S. First Submission at para. 434 n.502 (Note that the United States did not include Japan in this statement.)

⁸⁵ *U.S. -- Wheat Gluten* at para. 69 (emphasis added).

⁸⁶ U.S. First Submission at para. 445.

⁸⁷ *Argentina -- Footwear* at paras. 144-145.

narrow period of time. Indeed, the Oxford English Dictionary defines “coincide” as to “[o]ccupy the same portion of space . . . [o]ccur at or during the same time.”⁸⁸

114 Japan appreciates that this does not end the analysis. As the United States notes, the Appellate Body has offered a caveat. It might still be possible to support a finding of causation absent a coincidence of increased imports and a decline in the relevant injury factors, provided there is a “very compelling” analysis of why causation was still present.⁸⁹ Japan takes this to mean that, at a minimum, some level of demonstrable, relevant and “very compelling” correlation between increased imports and serious injury must exist. Correlation, after all, is a key element of any causation analysis. In the absence of any correlation, there can be no causation. The problem remains, however, that the United States did not offer a “compelling analysis” in this case. Its argument for a “correlation” relies largely on exaggerations and misstatements. Moreover, for all of its talk about the need to consider numerous factors, the U.S. defense of the ITC focuses on the same few factors as the ITC decision itself: import volume, import price, and domestic industry profits.

115 With respect to CCFRS, Japan has demonstrated that there was no *coincidence* of increased imports and serious injury to the domestic industry in 1998, the critical year for the ITC. Moreover, after 1998, imports declined as industry performance declined, reaching levels by the first half of 2001 that were well below import levels in 1996 on an annualized basis.⁹⁰ The United States’ only real response to this fact is an argument that the lingering effects of increased imports in 1998 impacted the industry even as long as two years after the increase.⁹¹ Japan posits that this is not the “compelling analysis” the Appellate Body had in mind. It defies reason to conclude that imports in 1998, whether in terms of volume or price, continue to have an effect in 2000 and 2001.

1. Import Volumes Did Not Have Lingering Effects In The Market And Did Not Remain At Substantially Higher Levels After 1998 Relative To The Period Prior To The Increase

116 Contrary to U.S. arguments, volume effects can be seen quickly. Steel products can be held in inventory, and inventory levels in this case do not suggest extended lingering effects. The inventory levels were approximately one month or less. In its report, the ITC reported that, for all products in the flat rolled grouping, year-end inventory levels ranged from 7 to 15% of total shipments -- between 0.6 and 1.2 months of inventory.⁹² For many individual steel products, the inventory levels never exceeded one month.⁹³ Thus, in much less than a single quarter, the volume effects would work their way through the system. The idea that imports in 1998 could have lingering adverse effects at the end of 1999 is fanciful. The idea that imports in 1998 would have any effect at all in 2000 or 2001 is abused.

⁸⁸ THE NEW SHORTER OXFORD ENGLISH DICTIONARY (1993) at 436.

⁸⁹ U.S. First Submission at para. 403 (*citing Argentina – Footwear* at para. 144).

⁹⁰ Japan First Submission at paras. 232-234.

⁹¹ U.S. First Submission at para. 446.

⁹² ITC Report Vol. II at Table FLAT-49.

⁹³ *Id.*

117 The United States also complains that import volumes in 1999 and 2000 “remained substantially higher” than in 1996 and 1997.⁹⁴ Yet this is a misleading statement. Over the 1996-1997 period, flat rolled imports averaged 10.1% of domestic production.⁹⁵ Over the 1999-2000 period, flat rolled imports averaged 10.6% of domestic production -- hardly “substantially higher.”⁹⁶ For individual flat rolled products, the comparison of imports relative to domestic production is the same:

**Changes In CCFRS Import Volumes Relative To Domestic Production In The Years
Before And After Increased Imports⁹⁷**

<u>Product</u>	<u>1996-1997 Average</u>	<u>1999-2000 Average</u>	<u>Change Over Period</u>
slab	9.1	11.2	+2.1
hot rolled	9.2	10.3	+1.1
cold rolled	9.1	8.2	-0.9
corrosion	13.4	12.3	-1.1
plate	27.5	15.1	-12.4

As reflected in the above table, the changes in imports relative to domestic production are small, and often negative -- imports had less of a role in 1999 - 2000 than in the earlier period.

118 This and other data reveal two fundamental mistakes in the U.S. argument. First, percentage increases can be misleading when the base number is small; an objectively small increase can generate a large percentage increase from a small number. Second, the United States does not take into account the growth in the overall market. Imports increased largely because *total* consumption was increasing up until 1999. It makes no sense to blame increased imports, when imports remained a stable part of the overall market.

119 The only year in which imports had any material increase in market share was 1998 and even in 1998, the increase was a mere 3.0 percentage points.⁹⁸ There simply was no “continued influx of import volumes” to cause any serious injury.⁹⁹ Import volumes were at stable, historical levels. Once the volume data is considered, it becomes clear that the U.S. argument (and the ITC decision) rests entirely on price. As Japan showed in response to Question 84 posed by the Panel, however, the U.S. treatment of pricing is seriously flawed.

120 The United States highlights the fact that 1998 was a worse year than 1997.¹⁰⁰ Given that 1997 was a peak year, of course 1998 measures are down from 1997. But given the U.S. insistence that Japan consider the whole period in context (which Japan does), the ITC should

⁹⁴ U.S. First Submission at para. 471.

⁹⁵ ITC Report Vol. II at Tables FLAT 8-11, 13, 16-19, 21; *See also* Complainants’ Common ANNEX A and ANNEX B.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ ITC Report at Vol. II at Tables FLAT 8-11 and 13, and Complainants’ Common ANNEX A.

⁹⁹ U.S. First Submission at para. 464.

¹⁰⁰ *Id.* at para. 470.

have, but did not, consider 1998 performance relative to 1996 -- the best measure of the “pre-increase” period. Moreover, the test is not whether some indicia declined in 1998. The test is whether over the full period, the import increases correlate with declines in industry performance. The comparison between any two years is incomplete. Over the full period, the disconnect becomes quite apparent. In 1999 and 2000, imports levels were not substantially above prior years. Again, the U.S. argument is not about the volume and market share of imports, but rests squarely on its flawed conclusions with respect to import price levels.

2. The U.S. Pricing Argument Ignores Both Market Fundamentals And The Conclusions To Be Drawn From An Examination Of Relative Pricing Patterns

121 If imports truly were “causing” injury to the domestic industry, the effects of imports would be felt as those imports entered the market. As a factual matter, the effect of imports will be felt fairly quickly in the steel industry. For most steel products -- and certainly for the products in the flat rolled steel grouping used by the U.S. -- there are active spot markets (*i.e.*, markets not subject to long term contracts).¹⁰¹ Thus, if imports themselves are having an effect on domestic prices, that effect will be seen quickly in changes in domestic industry spot market prices. Remarkably, given how much emphasis that the ITC placed on price as an indicator of the industry’s health,¹⁰² it ignored the substantial amount of pricing data it was provided that demonstrated the relationships between domestic and import prices. Instead, it focused on quarterly price series and simplistic assessments of underselling, not all of which revealed underselling by imports. Both are poor determinants of causation, particularly in light of the extensive and demonstrably reliable monthly pricing data available that showed how relative prices change over time, and whether domestic or import prices lead that trend.

122 In Japan’s response to Question 84 posed by the Panel, Japan demonstrated that domestic prices lead import prices with respect to hot rolled and cold rolled steel. The ITC and the U.S. claims to the contrary¹⁰³ are simply wrong. The ITC apparently did not attempt to reconcile this monthly data with its conclusions on causation, though it did see fit to use this very same monthly data in its report.¹⁰⁴ Instead, the ITC states as fact -- despite the limitations of its quarterly pricing data -- that import prices led domestic prices.

123 In the end, neither volume nor price shows the requisite relationship between imports and the industry’s performance. Something else was at play in this market that was more important.

¹⁰¹ For example, the ITC found in the March 2000 Cold Rolled AD/CVD case that 38 percent of domestic product and 51 percent of imports were sold on a spot basis. *See Certain Cold Rolled Steel Products From Argentina, et. al.*, Inv. No. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final), USITC Pub. 3283, March 2000 at V-8 (**Exh. CC-34**).

¹⁰² *See, e.g.*, ITC Report at 62.

¹⁰³ *See* U.S. First Submission at para. 472 (*citing* ITC Report at 60-62).

¹⁰⁴ ITC Report Vol. II at OVERVIEW-58.

C. The United States Failed To Perform A Reasoned And Adequate Non-Attribution Analysis With Respect To Flat Rolled Products

124 Even if there existed the requisite correlation between increased imports and industry performance, and even if the ITC had demonstrated the requisite correlation, the ITC improperly failed to ensure that it did not attribute to imports the effects of other causes. As already stated, the ITC applied what amounts to a “trust us -- we know what we are doing” standard. Rather than provide an explicit and well-reasoned rationale for separating and distinguishing alternative causes, it simply stated conclusions. In offering the same conclusory statements, the United States alludes to the discretion and deference afforded to authorities under the Agreement on Safeguards,¹⁰⁵ but misunderstands what the Agreement actually requires. This Panel was not formed to defer to the conclusions reached by the United States. It was formed to evaluate the rationales provided for those conclusions, and to make an “objective assessment” of the facts.

125 We review below three of the other causes at play in the flat rolled steel markets, and provide our reactions to the U.S. arguments.

1. Other Causal Factors Were Far More Important To The Decline In Industry Performance Than Increased Imports

126 During the course of the ITC investigation, interested parties presented the ITC with evidence and economic analysis that showed how myriad other factors were impacting the domestic industries making flat rolled steel products. We address below the three which in our view were primarily to blame for the industry’s troubles -- declining demand, domestic capacity increases, and intra-industry competition. We also explain why the ITC’s analysis failed to ensure that the effects of these other causes were not blamed on imports.

a. Declining Demand

127 The ITC may have identified trends in demand as a possible factor, but it based its analysis on faulty data and failed to distinguish the role of this factor from imports.

128 According to the United States, demand was a relatively unimportant factor in the market because demand did not begin to fall until 2001. Its entire analysis suffers, however, because it is based on incorrect data. The U.S. First Submission,¹⁰⁶ like the ITC, relies on figures that merely add together shipments of each type of flat rolled steel, ignoring the fact that these figures reflect double and triple counting of tons of steel as they go through the various stages of production -- an ironic ploy, given that the mills’ vertical integration was the reason for conjoining these products into a single like product. A more proper measure of apparent domestic consumption -- imports of each distinct finished flat rolled like product plus domestic commercial shipments of those products -- shows the clear drop in demand as early as 1999:

¹⁰⁵ See, e.g., U.S. First Submission at para. 417.

¹⁰⁶ *Id.* at para. 487, n.614.

Change In Apparent Domestic Consumption: 1996 - 2000¹⁰⁷

Year	Apparent Domestic Consumption	Change
1996	75.8	--
1997	78.1	+2.3
1998	84.1	+6.0
1999	82.4	-1.7
2000	83.1	+0.7

Thus, after strong growth in 1997 and 1998, demand fell noticeably in 1999 and remained low in 2000 -- the very period when the domestic industry operating profits began to fall.¹⁰⁸

129 In fact, during 2000, there were sharp changes in demand, as illustrated when we break out the last three half-year periods:

Change In Apparent Domestic Consumption: Interim Periods 2000-2001¹⁰⁹

Year	Apparent Domestic Consumption	Change
1H 2000	45.0	
2H 2000	38.1	-6.9
1H 2001	36.7	-1.4

130 The ITC analysis is also too static. The United States argues that demand in 2000 was higher than in 1996.¹¹⁰ This statement may be true, but it is largely irrelevant. In most markets, demand increases over time. The issue for understanding the competitive dynamics is not a mechanical comparison of 2000 to 1996, but an analysis of the trends from year to year within the overall period of investigation, and, if available, the trends within a year. It is simply

¹⁰⁷ Sum of total domestic commercial shipments reported in ITC Report Vol. II at Tables FLAT-12, 13, 14, 15 and 17 plus, total imports reported in Tables FLAT- 3, 4, 5, 6, 7 and 9 (**Exh. CC-6.**) The addition of the five flat rolled products is provided in Japan First Submission ANNEX B. Tin mill and GOES are excluded from this analysis. Note the figures here differ from those provide in Japan's First Submission (para. 257) because there we did not exclude exports. The U.S. industry did not export commercially significant quantities, therefore the difference is immaterial.

¹⁰⁸ The ITC makes another mistake: to consider only aggregate flat rolled demand is to ignore a key difference in trends between finished and semi-finished flat rolled steel. Increasing imports of semi-finished steel at the end of the period mask the decline in demand for finished steel.

¹⁰⁹ ITC Report Vol. II at Tables FLAT-12, 13, 14, 15 and 17 plus, total imports reported in Tables FLAT- 3, 4, 5, 6, 7 and 9 (**Exh. CC-6.**) *see also*, Japan First Submission Annex B.

¹¹⁰ U.S. First Submission at para. 485.

ludicrous for the United States to try and ignore the collapse in demand in the second half of 2000, and the role that collapse had on prices and the condition of the domestic industry.

131 The United States tries to dismiss the correlation between declining demand and declining operating performance.¹¹¹ The argument rests entirely on the unreliable data in footnote 614 of the U.S. First Submission, which is rather silly double counting. If one considers the trends in apparent domestic consumption and imports from 1999 to 2001, the relative importance of the two factors is obvious. The table at paragraph 257 of Japan's First Submission tells the story: from 1999 to 2001, as imports retreated from the market and as the domestic industry captured more and more of the market, operating performance declined. Thus, the decline in domestic industry operating performance correlates with declining demand, not with increased levels of imports. In any event, no effort at all was made to separate and distinguish the effects of demand from imports.

b. Domestic Capacity Increases

132 As with aggregate demand, the ITC did not adequately analyze the role of changing domestic capacity. Here again, simply acknowledging a factor and then dismissing it does not constitute genuine analysis of the role of that factor on the competitive dynamics in the market.

133 The United States argues in its First Submission that the ITC considered the effect of domestic capacity on pricing levels.¹¹² But where and how did it do so? The ITC simply undertook its usual examination of domestic pricing versus import pricing, and then reached its usual conclusion -- that imports were to blame. The U.S. First Submission focuses on two factors: import underselling and the import surge in 1998.¹¹³ Properly understood, however, neither of these points really addresses the role of domestic capacity.

134 The ITC stressed the mere fact of underselling without analyzing at all how underselling changed over time. Margins of underselling in 1999 and 2000 were at or below the levels in 1996 and 1997, which posed no problem. Underselling therefore did not change. What changed was domestic capacity and, particularly, capacity relative to demand.

135 Part of the problem is that the United States does not appear to grasp that various factors cannot be analyzed one by one, but must be viewed together to understand how they interact with one another. This is particularly true in this case. In the U.S. steel market, from 1999 to 2001, several factors converged: demand was stagnant or falling; domestic supply was increasing because of the dramatic increases in domestic capacity; and foreign supply was stable or falling. With domestic firms capturing more and more of a declining market, it simply makes no economic sense to exonerate the growing domestic capacity and blame the stable or declining imports. Yet, that is precisely what the ITC did in this case.

136 Indeed, appropriate analysis would consider capacity relative to demand particularly in light of the already existing AD/CVD orders or investigations that affected the competitive

¹¹¹ *Id.* at para. 487.

¹¹² *Id.* at para. 488.

¹¹³ *Id.* at para. 492.

dynamics in the market for flat rolled steel products. The ITC largely ignored the role of AD/CVD orders and investigations on hot rolled and cold rolled steel imports during this key period, and thereby failed to understand the role of expanding domestic capacity.

137 Given these economic forces, it is not at all surprising that domestic pricing generally led import pricing. The U.S. claim to the contrary is wrong,¹¹⁴ and relies on overly simplistic analysis of quarterly average unit values, rather than monthly prices. The graphs of hot rolled steel and cold rolled steel pricing provided in response to Question 84 from the Panel tell a compelling story that undermines the U.S. argument in this case. With domestic firms holding the dominant share of the market and expanding capacity, it is quite natural that domestic firms would set the market price and foreign firms would react to that price.

138 The surge in 1998 remains the linchpin in the U.S. argument, but has only limited relevance for pricing levels in 1999 and 2000. As we discussed above and in answer to Question 86 from the Panel, post-1998 inventory levels were resolved within months, not years. The 1998 imports completely worked through the system by mid-1999 and were of no relevance at all in 2000 or 2001.

139 The U.S. attempt to dismiss domestic capacity increases is therefore wrong on several counts. First, as a matter of economic theory, it is incorrect to argue that capacity only matters when it is turned into actual shipments. Capacity can matter anyway.¹¹⁵ The United States cites the staff economics memo, but then ignores the extensive evidence discussed by interested parties to explain the importance of capacity.¹¹⁶ One only needs to read the newspaper stories about economic distress in those industries – like telecommunications – that added too much capacity to realize the important role that capacity can play in determining industry health.¹¹⁷

¹¹⁴ U.S. First Submission at para. 494. In this case, as already noted in this submission, the ITC had readily available monthly data to better understand pricing dynamics, but instead ignored that data in favor of the much more crude quarterly average unit value data that it uses in other cases.

¹¹⁵ See Joint Respondents' Posthearing Brief on Flat-Rolled Steel (1 Oct. 2001) (filed by the Law Firm of Willkie Farr & Gallagher) (responding to Commissioner Hillman's question how capacity, as opposed to actual shipments, can affect price.) at 93 (**Exh. CC-55**).

¹¹⁶ See Japan's First Submission at para. 276, *citing* Joint Respondents' Prehearing Brief on Hot Rolled Steel (Product Category A.3), (10 Sept. 2001) (filed by the law firm of Kaye Scholer) (see Exhibit 26, Dr. Prusa Econometric Exhibits at 4-6, *explaining* "additions to hot rolled capacity have lowered the domestic hot rolled prices by a least \$7 ton. This is a direct effect. EAF capacity has an additional \$20 impact on hot rolled prices. Taken together, the impact of new capacity is 2-3 times more important than imports.") (**Exh. CC-52**); Joint Respondents' Prehearing Brief: Product Group 4, Cold Rolled Steel, (10 Sept. 2001) (Econometric Exhibits) (filed by the Law Firm of Willkie Farr & Gallagher) (see Exhibit 4, Dr. Prusa Econometric Exhibit at 16, quantifying the impact on the domestic cold rolled price.) (**Exh. CC-53**); See Joint Respondents Pre-Hearing Brief: Carbon Alloy Flat Products, Product 6 -- Corrosion-Resistant and Other Coated Sheet and Strip, (10 Sept. 2001) (filed by the Law Firm of Sharrets Paley) (Econometric Exhibits) (see Exhibit 8, Dr. Prusa Econometric Exhibits at 12-15, quantifying the impact on the domestic hot-dipped galvanized price.) (**Exh. CC-54**).

¹¹⁷ See Japan's First Submission at para. 276, *referring to Certain Cold Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-834, 836, and 838 (Final) ITC Pub. 3283 (Mar. 2000) (**Exh. CC-34**); see also Joint Respondents' Prehearing Brief on Corrosion-Resistant and Other Coated Sheet and Strip (10 Sept. 2000) at 46 (filed by the Law Firm Gibson, Dunn & Crutcher) *citing* domestic producers' August 28, 2000 Sunset Review Prehearing Brief at 50-51 (**Exh. CC-55**).

140 Second, one needs to consider capacity in light of barriers to entry facing that capacity. Domestic capacity has no barriers; domestic shipments can easily enter the market. Import capacity has intrinsic disadvantages, due to the lead times and uncertainty. In this case, that uncertainty increased dramatically because of the numerous AD/CVD investigations that chased imports from the market.

141 The United States tries to shift the focus to the role of foreign capacity.¹¹⁸ But this argument is fundamentally misleading, since so little of foreign capacity goes to the U.S. market. The United States argues that 44 million tons of new foreign capacity is more important than 32.2 million tons of domestic capacity. Yet over the five-year period of investigation, virtually all U.S. capacity was dedicated to the U.S. market,¹¹⁹ as reflected in the ITC's export statistics, while less than four percent of foreign capacity went to the U.S. market.¹²⁰ By any reasonable measure, domestic capacity mattered much more than foreign capacity, but the ITC didn't even try to isolate its effects.

142 The United States also tries to shift the focus away from domestic capacity by focusing on shipment levels.¹²¹ This argument disingenuously concentrates only on 1998, which is fundamentally misleading. In 1999 and 2000 -- the years when domestic industry performance deteriorated -- import shipments were down, but domestic shipments were up and domestic capacity was up. In 1999 and 2000, import share of the market was stable at about 10.5% in both years, a level consistent with 1996 and 1997.

Change In Import And Domestic Shipments, Domestic Operating Performance: 1997 - 2000¹²²

Year	Change in Import Shipments from Prior Year	Change in Domestic Shipments from Prior Year	Operating Performance in that Year
1997	902	1619	6.1
1998	6031	-111	4.0
1999	-4488	3119	-0.7
2000	77	1190	-1.4

When trying to understand what happened in 1999 and 2000, when domestic industry operating performance declined, imports were retreating from the market, and domestic shipments were increasing. In both 1999 and 2000, increasing domestic shipments dwarfed changes in the import levels. It is simply wrong to blame declining imports and ignore the increasing domestic capacity that was fueling increasing domestic shipments. At the very least, the impact of domestic capacity increases should have been separated and distinguished from imports to test the ITC's theories and ensure that their effect was not mistakenly attributed to imports.

¹¹⁸ U.S. First Submission at para. 497.

¹¹⁹ See ITC Report Vol. II at Tables FLAT-16-21.

¹²⁰ *Id.* at Tables FLAT-30, 33, 36, 39 and 43.

¹²¹ U.S. First Submission at para. 498.

¹²² See ITC Report Vol. II at Tables FLAT-12-17 and FLAT- 20-25, and Japan's First Submission, ANNEX B.

c. **Intra-Industry Competition**

143 The ITC's treatment of intra-industry competition also illustrates the error of the ITC's overly simplistic analysis. The ITC glossed over data that was inconsistent with its preordained conclusion that imports were to blame, and that all other factors needed to be dismissed. The ITC ignored a considerable body of data that undermines its conclusions.

144 First, the ITC jumped to the conclusion that imports led down prices based merely on the existence of import underselling.¹²³ Imports were not the price leaders, as Japan demonstrated in answer to Question 84 from the Panel. The key variable is not the fact of underselling from quarter to quarter, but the pattern by which firms initiate the price change and then, which firms react. The monthly data reveal far more than the quarterly average unit prices, and show that domestic firms led down prices.

145 Second, the ITC ignored evidence that Nucor, a domestic minimill, was the price leader for hot rolled and cold rolled steel products, two of the most important categories of flat rolled steel.¹²⁴ This blind eye is quite surprising, since the ITC had explicitly relied on this evidence in other recent trade proceedings involving cold rolled steel.¹²⁵

146 Third, the ITC ignored data showing that minimills gained market share with lower prices, particularly in 2000 and 2001:

Minimill / Import / Integrated Market Shares¹²⁶

<u>Period</u>	<u>Import Share</u>	<u>Minimill Share</u>	<u>Integrated Share</u>
1H00	26.7%	21.8%	51.5%
2H00	22.2%	25.9%	51.9%
1H01	13.1%	31.4%	55.5%

Not surprisingly, given that in 2001 most import sources were shut out of the market by AD/CVD orders, minimills were disproportionately the beneficiaries, gaining twice as much market share as integrated firms.

¹²³ U.S. First Submission, paras. 508-09.

¹²⁴ See Joint Respondents' Post Hearing Brief on Flat-Rolled Steel (1 Oct. 2001) (filed by the Law Firm Willkie Farr & Gallagher) at 94 (**Exh. CC-53**) (At the ITC's hearings in the recent AD investigation of hot rolled steel, Nucor's CEO testified, "If our order book is weak in the present quarter, we will lower our prices to increase orders. What happened in 2000? A period of very strong demand for hot rolled. By the end of the first quarter and through the year, our order book for hot rolled was falling. We responded by reducing our prices." *Id. citing Certain Hot -Rolled Steel from Argentina and South Africa*, USITC Pub. 3446, Inv. Nos. 701-TA-404 (Final) and 731-TA-898 and 905 (Final) (Aug. 2001), Transcript at 57-58 (statement of Mr. DiMicco). He also stated, "Based on our previous experience, we believe as a low-cost producer worldwide its certainly better to run at high capacity utilization with low prices than at low capacity utilization with low prices.").

¹²⁵ See **Exh. CC-34**, *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-8324, 836, and 838 (Final) ITC Pub. 3283 (Mar. 2000) at 22-23.

¹²⁶ See U.S. First Submission at Exhibit US-60.

147 The United States again tries to shift the focus to foreign capacity.¹²⁷ We demonstrated above why this comparison of crude aggregate capacity is incorrect. Since virtually all U.S. capacity stays in the U.S. market, minimill capacity remains almost exclusively in the U.S. market. Moreover, the ITC knows that minimills historically have priced to fill their mills, and try to maintain high rates of capacity utilization.¹²⁸ With such a business model, new minimill capacity is much more likely to affect domestic price levels than foreign capacity.

148 The United States also tries to shift the focus to aggregate shipment levels.¹²⁹ But in doing so, the United States fails to acknowledge that minimills produce predominately plate, hot rolled, and cold rolled steel, and produce only limited galvanized steel and no slab.¹³⁰ The United States also considers only the level of shipments, not the trends over time. From 1999 to 2001, when the domestic industry began to experience problems, import shipments were falling and minimill shipments were increasing.

149 The mere fact that the ITC concluded that minimill competition did not matter is not enough. The evidence before the ITC, when objectively evaluated, demonstrates that minimill competition played a substantial role -- a role which should have been measured and then distinguished and separated from the sale of imports in order to ensure that its effects were not mistakenly attributed to imports.

2. The United States Suspicion Of Econometrics Is Unwarranted And Wrong

150 The United States is prepared to disregard econometric analyses based on its arguments that: (a) the Appellate Body has stated that a Member is not necessarily required to quantify causes of injury;¹³¹ and (b) the undertaking is supposedly too complex.¹³² Japan's response is that the Agreement on Safeguards may not mandate detailed economic studies in every case, but when the data permits such studies, and the parties undertake the studies, the authorities have an obligation to take them seriously. Difficulty is no excuse for omission. The Appellate Body in *U.S. - Hot-Rolled Steel* clarified that although the task of non-attribution may be a difficult one, it is the price paid to justify application of trade remedy measures and it is a task which Members of the WTO agreed to undertake.¹³³ Moreover, the United States reads too much into Appellate Body silence. The Appellate Body has not yet had to address a situation where the difficult task of non-attribution might require some degree of quantification.

¹²⁷ U.S. First Submission at para. 511.

¹²⁸ See Joint Respondents' Prehearing Brief on Cold Rolled Steel (11 Sept. 2001) (filed by the Law Firm of Willkie Farr & Gallagher) (discussing how the U.S. domestic industry has consistently created and fully utilized its production facilities as evidenced by increasing shipments throughout the period) at 20-23 (Exh. CC-53).

¹²⁹ U.S. First Submission at para. 512.

¹³⁰ ITC Report at 65 ("Hot rolled steel is the primary commercial product for minimills.").

¹³¹ See, e.g., U.S. First Submission at para. 435.

¹³² *Id.* at para. 413 n.464 ("to quantify the effects of imports and other factors on these indicia, it would literally require the competent authority to perform such a calculation hundreds of separate times.")

¹³³ *United States Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R, Appellate Body Report adopted 24 July 2001 at para. 228.

151 Japan is not advocating that, because interested parties submitted a comprehensive econometric analysis, that analysis must form the basis for any ITC conclusions. However, the data used in the analysis, if found to be reliable,¹³⁴ should have been examined and tested, whether on the basis of the econometric models submitted by the parties or based on the authority's own analysis of the data. To pinpoint an alleged flaw in an analysis and simply throw away all of the valuable underlying data is unreasonable.

152 The United States not surprisingly wants to avoid any serious consideration of econometric evidence. As that evidence so completely undermines the simplistic conclusions reached by the ITC in this case, the United States tries its best to dismiss it. To justify its decision, the United States mischaracterizes both the econometric studies and the ITC staff memorandum analyzing them.

153 In this regard, the Panel should read the main body of the ITC staff memorandum, not just the summary conclusions to which the United States tries to direct attention. The main body makes clear two key points. First, the criticism of how the interested parties' study modeled intra-industry competition applies only to that factor -- not to the other factors that were studied. Thus, the ITC's own staff economists implicitly embraced the findings about the relative roles of demand and imports, changing raw material prices and imports, and domestic capacity and imports. Even if one were to discount interested parties' arguments about minimill competition, the other factors overwhelmingly matter more than imports in explaining price declines. There is simply no basis in the body of the memorandum to support the overbroad conclusion that the interested parties' studies should be rejected.

154 Second, the ITC staff memorandum notes that the domestic industry study and the interested parties' study reached essentially identical conclusions on cold rolled steel and galvanized steel. Both studies found that imports of those two key flat rolled products had no meaningful effect on price levels.¹³⁵ The ITC ignored this finding because it substantially undercut its decision to bundle various flat rolled products into one like product. Having decided on such an over-broad like product grouping, the ITC proceeded to ignore any inconvenient evidence about the individual steel products that made up that grouping. In the end, a single Commissioner requested an analysis from a staff economist to justify ignoring the studies.¹³⁶ The resulting perfunctory memorandum contained a conclusion that only loosely connected to the discussion in the main body of the memorandum. The Commission then largely ignored the studies, rather than giving them the careful attention they deserved.

155 In its answers to the Panel questions, the United States continues to mischaracterize the potential role of such studies, offering several misleading arguments.

¹³⁴ We note that the data contained in interested parties' econometric model came from publicly available sources, including the U.S. Government and the association representing much of the domestic steel industry. While the conclusions of the model were criticized, none of the underlying data was ever challenged. Indeed, some of that data, including monthly domestic pricing data, was relied upon in the ITC Report. See ITC Report Vol. II at OVERVIEW 58.

¹³⁵ ITC Staff Memorandum (EC-Y-042) to Commissioner Bragg, Inv. No. TA-201-73 Steel (22 Oct. 2001) (Exh. CC-10).

¹³⁶ *Id.*

156 First, the United States seems to think that the Agreement on Safeguards only allows analysis that considers all of the indicia of injury at once.¹³⁷ This is unfounded. Such studies need not simultaneously consider all indicia of injury (*e.g.*, price, profits, capacity utilization, etc.), to meaningfully contribute to the analysis. In fact, it is quite appropriate to use various approaches to shed light on various factors. If an econometric model allows one to better understand the factors affecting domestic price levels, for example, then it is perfectly acceptable and appropriate to isolate price and perform a regression analysis on those variables that affect price. No one has argued that such a model replaces other modes of analysis for the other factors. But it would be wrong to dismiss data that more accurately assesses particular industry injury indicia.

157 Moreover, in this particular case, the focus on domestic pricing is quite appropriate. Since both the ITC below and the United States before this Panel have placed such an emphasis on declining domestic prices, it was appropriate and understandable for the parties to devote particular attention to understanding the causes of these domestic price declines. That is precisely what the econometric studies sought to do. Again, the ITC could have done something more with the data instead of completely dismissing it. Indeed, it might have started by simply drawing the graph Japan provided in response to Question 84 from the Panel showing that domestic pricing leads import pricing. It is not apparent that even this rudimentary (and seemingly obvious) exercise was undertaken. Instead, we are left with conclusory comments, such as, “. . . imports undersold minimills consistently on plate and cold rolled . . . [g]iven this record evidence, the ITC properly concluded that it was not ‘low cost’ minimills, but imports, that led prices in the carbon flat rolled market down so consistently during the period from 1998 to 2001.”¹³⁸

158 Second, the United States tries to dismiss regression analysis by alleging there is insufficient data.¹³⁹ That may be true in some cases, but it was not true here. The United States disingenuously implies there are only five data points. But in this case, the parties provided the ITC with monthly pricing data for a five to seven-year period. Even the United States admits that econometricians typically strive for at least 30 data points in time series econometrics.¹⁴⁰ In this case, sixty data points were provided -- more than adequate for regression analysis in this case.

159 Third, the United States in response to Question 88 from the Panel tries to make the exercise seem novel, too theoretical, and even unreliable. However, developing economic and econometric models to explain price levels is an extremely common and well understood task. Competition authorities regularly employ them.¹⁴¹ Authorities need not create a single complex

¹³⁷ U.S. Answers, para. 153.

¹³⁸ U.S. First Submission at para. 508.

¹³⁹ U.S. Answers at paras. 157-161.

¹⁴⁰ *Id.* at para. 160.

¹⁴¹ Econometric and regression analyses are considered reliable disciplines in U.S. competition law and are regularly admitted in antitrust cases to prove injury and to determine damages. *Allapattah Servs. v. Exxon Corp.*, 61 F. Supp. 2d 1335, 1347 (S.D. Fla. 1999). For decades, other administrative agencies have routinely relied on econometric studies in making their decisions. *See, e.g., Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 1390-91 (D.C. Cir. 1985) (affirming Department of Energy's use of econometric model); *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 987 (D.C. Cir. 1985) (affirming FTC's interpretation of econometric

model to explain everything. Rather, authorities can isolate key issues in a particular case – such as distinguishing the role of different factors in explaining declining domestic prices – and use mainstream economic techniques to understand better those key issues. Any doubts the Panel may have on this point could be resolved merely by asking the WTO’s own economic staff.

VII. BECAUSE THE ITC FAILED TO ENSURE THAT IT DID NOT ATTRIBUTE TO IMPORTS THE EFFECTS OF OTHER CAUSES, IT ALSO FAILED TO ENSURE THAT ITS MEASURE WAS IMPOSED “ONLY TO THE EXTENT NECESSARY” TO ADDRESS THE EFFECTS OF INCREASED IMPORTS

160 The United States does not appear to disagree completely with our argument that a measure must be supported by analysis demonstrating that it is no more restrictive than necessary to remedy serious injury caused by increased imports. Indeed, in its responses to the Panel’s questions, the United States concurs that, absent such an analysis, which can be borrowed from the non-attribution analysis required by Article 4.2(b) or undertaken independent of that analysis, a measure does not meet the requirements of Article 5.1.¹⁴²

161 In other areas, however, there is no common ground. In particular, the United States continues to argue that the remedy envisioned under Article 5.1 is in fact additive, and may be used to prevent or remedy serious injury *plus* facilitate adjustment. This is contrary to the Appellate Body’s treatment of Article 5.1. Finally the United States argues that Article 3.1 does not require Members to offer an explanation of the findings and reasoned conclusions supporting the *actual* measure imposed. This contradicts the United States’ admission that an analysis justifying the measure, whether generated by Article 4.2(b) or generated independently, is required.¹⁴³

A. Articles 3.1 and 5.1 Require the Measures to be Limited to the Extent Necessary to Fulfill the Intent of the Agreement

162 Article 5.1 provides that safeguard measures are to be applied “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.” In other words, a measure must address only the serious injury inflicted by imports. In *U.S. – Line Pipe*, the Appellate Body discussed the relationship between Article 5.1 and Article 4.2, holding that Article 5.1 requires safeguard measures to be no more restrictive than necessary to remedy the serious injury caused by imports, as “separated” and “distinguished” under Article 4.2(b).¹⁴⁴ Article 4.2(b) serves the purposes of Article 5.1 in two ways. First, it prevents an authority from inferring a causal link between increased imports and serious injury when several factors cause

evidence); *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 627 (10th Cir. 1983) (“The use of the econometric studies is peculiarly within the expertise of FCC.”).

Econometric studies have, in fact, informed ITC decision making in previous injury determinations. See, e.g., **Exh. CC-34**, *Certain Cold-Rolled Steel Products from Argentina, Brazil, Japan, Russia, South Africa and Thailand*, Inv. Nos. 701-TA-393 and 731-TA-829-830, 833-8324, 836, and 838 (Final) ITC Pub. 3283 (Mar. 2000).

¹⁴² U.S. Answers at para. 188.

¹⁴³ *Id.*

¹⁴⁴ *U.S. – Line Pipe* at para. 260.

injury at the same time.¹⁴⁵ Second, and more importantly, it is a “benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports”; and, therefore, it “informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1.”¹⁴⁶

163 Article 3.1 provides that a safeguard measure may be applied only after an investigation, followed by a report containing “findings and reasoned conclusions on all pertinent issues of fact and law.” Article 3.1 stands as an important component of justifying that a measure is no more restrictive than necessary for addressing the serious injury caused by increased imports. The Appellate Body in *U.S. – Line Pipe* noted the link between Article 3.1 and Article 5.1 for purposes of clearly explaining and justifying the extent of the application of the measure.¹⁴⁷ While Article 5.1 itself may not require an explanation, the link between Articles 3.1 and 5.1 reflects the assumption by the Appellate Body as well as inherent in the Agreement on Safeguards that a Member will perform and publish a proper non-attribution analysis under Articles 3.1 and 4.2 before taking a measure, and by doing so to provide a justification of the measure under Article 5.1.¹⁴⁸

164 In effect, if a competent authority performs and publishes the analysis envisioned under Article 4.2(b), it can meet the obligation under Article 5.1 to ensure that a measure be no more restrictive than necessary to remedy serious injury from increased imports. At least on this point, there seems to be some common ground between the United States and the complaining parties. Indeed, the United States admits in response to Question 99 from the Panel, that the non-attribution analysis under Article 4.2(b) informs the decision under Article 5.1. Implicit in its response that “a second non-attribution analysis is redundant” is the recognition that an analysis ensuring that a measure is no more restrictive than necessary must be performed at some point, whether in meeting the obligation of Article 4.2(b) or independently.

165 Of course, the United States’ failing under Article 5.1 is not that it did not perform an assessment of the measure distinct from the non-attribution analysis required by 4.2(b). Rather, the United States failed to perform an analysis of any kind. As set out in our discussion of causation, the ITC failed to “distinguish” and “separate” the serious injury caused by increased imports in violation of the non-attribution requirement of Article 4.2(b). This creates an immediate problem for purposes of crafting a remedy. Absent an appropriate “benchmark,” the ITC could not possibly determine how any measure could be tailored to the serious injury caused by increased imports.

B. Article 5.1 Does Not Provide For An Additive Remedy

166 The United States interprets Article 5.1 as being additive. In other words, a remedy may prevent or remedy serious injury *plus* facilitate adjustment beyond the adjustment to increased imports. This position is reflected in paragraph 73 of its Oral Statement at the First Meeting with the Panel and also in its response to Question 112 posed by the Panel. According to the United

¹⁴⁵ *Id.* at para. 252.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at para. 236. *Line Pipe* also addressed the context provided by Article 4.2.

¹⁴⁸ *Id.* at paras. 233 and 236.

States, if a measure is sufficient to remedy serious injury but will not facilitate adjustment, a more restrictive measure is allowed under Article 5.1. The United States asserts that adjustment is not limited to that adjustment which is required in response to increased imports. In sum, the United States appears to claim that it can impose measures sufficient to remedy serious injury from all sources and, if necessary, increase that remedy to facilitate adjustment from all sources of that injury. This is inconsistent with the rationale in *Line Pipe* linking the Article 4.2(b) non-attribution analysis to the extent of the measures under Article 5.1. It is also contrary to the limitations on quantitative measures under Article 5.1, which imply restoration of the *status quo ante* as a limitation on measures in general.

C. The Safeguard Measures Actually Imposed By The President Are More Restrictive Than The ITC's Recommendations, And In The Absence Of Investigation Or Explanation, Must Be Found Inconsistent With Article 3.1

167 The United States has not explained or justified why the President can, without his own explanation, impose measures that lack support through a proper investigation (including non-attribution analysis required under Article 4.2) pursuant to Article 3.1. Such decision cannot be justified under Article 5.1 simply because the United States employs a bifurcated process that leaves the ultimate decision on the extent and scope of the measure imposed to the President. We repeat our arguments that, even if the ITC's recommendations were acceptable under Article 5.1, which they are not, the President's action in imposing the safeguards measures still violates Article 3.1, given the higher tariffs imposed by the President, and the different group of countries to which the tariffs applied. No attempt was made by the President to explain or justify his measures.

168 The fact remains that there is a disconnect between the ITC report and the President's measure. Because of this disconnect, the ITC report cannot support the decision by the President to impose a remedy that is more severe than what the ITC recommended. The President fails, therefore, to meet the requirements of Article 3.1, because the President, himself, made no attempt to explain how his safeguard measures were no more restrictive than necessary under Article 5.1. The President, therefore, did not "clearly explain and 'justify' the extent of the application of the measure."¹⁴⁹ Where the President makes a decision that is inconsistent with the ITC's recommendation, it is no longer supported by the ITC's explanation. In that case, the President's imposition of such measures contradicts the premise of the Agreement that a measure taken after an investigation pursuant to Article 3.1, and consistent with that investigation, must be justifiable under Article 5.1.

VIII. THE UNITED STATES FAILED TO APPLY THE MEASURES IN THIS CASE "IRRESPECTIVE OF SOURCE", AS REQUIRED BY ARTICLE 2.2 OF THE AGREEMENT ON SAFEGUARDS AND BY THE MFN REQUIREMENT UNDER ARTICLE I:1 OF GATT 1994

169 The President's decision to exempt Canada, Mexico and Israel from the steel safeguard measures due to the existence of free-trade agreements between the United States and those

¹⁴⁹ U.S. – *Line Pipe* at para. 236.

nations violated the requirement in Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994 to apply the measures to imports irrespective of their source. Safeguard measures are intended to be global in nature. Provisions within free-trade agreements permitting the exclusion of FTA partners cannot justify departure from the non-discrimination principle. Moreover, even if they could, in some circumstances, justify departure, the United States does not meet the conditions that would justify non-application of the measures.

170 In its First Written Submission, the United States erroneously argues that GATT Article XXIV provides an exception to the general MFN principle.¹⁵⁰ This argument is incorrect because the plain meaning of Article 2.2 requires that once a Member conducts an investigation and reaches an affirmative determination, any safeguard measures imposed must be applied to imports from all sources, absent an exception, such as special treatment of customs union members and developing countries, and, even then, only in certain circumstances.

171 At paragraph 1247 of its First Written Submission, the United States cites with approval the statement of the Panel in *U.S. – Line Pipe* that “the United States is entitled to rely on an Article XXIV defense . . .”¹⁵¹ U.S. reliance on the Panel decision in *Line Pipe* is misplaced.¹⁵² First, the Appellate Body declared that this finding was moot and had no legal effect.¹⁵³ Second, the Panel’s reasoning in *Line Pipe* is flawed; it is shallow and conclusory rather than convincing.

172 The U.S. assertion that footnote 1 to Article 2 of the Agreement on Safeguards does not disturb the exceptions permitted by GATT Article XXIV also is misguided. The United States both misreads footnote 1 and misinterprets prior decisions on this issue.

173 First, footnote 1 is inapplicable to free-trade areas (or their members). It does not define a “Member” as a free-trade area or a country belonging to one; nor does it mention free-trade areas in any other way.¹⁵⁴ The United States claims, in essence, that the last sentence of footnote 1 has nothing to do with the rest of the footnote, and that it covers free-trade areas as well as customs unions. This sentence, however, merely states that “[n]othing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.” It says nothing about free-trade areas. If the Members meant for the same rules to apply to both customs unions and free-trade areas, they would have said so quite clearly.

174 Nevertheless, for the sake of argument, Japan will assume that the last sentence of footnote 1 could be read on its own, divorced from the first two sentences. If so, textual analysis and precedent indicate that this sentence does not excuse the non-application by the United States of the safeguard measures to its FTA partners -- Canada, Mexico, and Israel.

175 Use of the Article XXIV exception is strictly conditioned with respect to customs unions. The Appellate Body in *Argentina – Footwear*, citing *Turkey – Textiles*, said that:

¹⁵⁰ U.S. First Submission at paras. 1228-1248.

¹⁵¹ *U.S. – Line Pipe* (Panel Report) at para. 7.146.

¹⁵² *U.S. – Line Pipe* (Panel Report) at paras. 7.127 to 7.163.

¹⁵³ *U.S. – Line Pipe* at para. 199.

¹⁵⁴ In *Argentina – Footwear*, the Appellate Body said that “[a] customs union may apply a safeguard measure as a single unit or on behalf of a member state.” Footnote 1, then applies only when a customs union as a whole takes action; it does not even apply when a member of a customs union applies a safeguards measure.

under certain conditions, "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions." . . . [T]his defence is available only when it is demonstrated by the Member imposing the measure that "the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" and "that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."¹⁵⁵

It would be anomalous, indeed, if free-trade areas and their members (which are not even mentioned in footnote 1) were subject to no restrictions conditioning their ability to use the defense of Article XXIV while customs unions (which are specified in the text) could benefit from the defence only in limited circumstances.

176 Moreover, even if one assumes that the last sentence of footnote 1 applies to free-trade areas, the Article XXIV defense is not available to the United States. The text of GATT Article XXIV:8(b) states that a free-trade area "shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all trade." The use of "are eliminated" makes clear that a general exception from safeguard measures must be written into an FTA in order for the Article XXIV exception to be applicable. Moreover, if the measure is not subject to general exemption, how would one judge whether or not the "substantially all" requirement under Articles XXIV:8(b) is met in terms of such conditional elimination?

177 Safeguard measures were not eliminated in either United States FTA. Article 802.1 of the NAFTA conditions exemption of Canada and Mexico from a safeguard measure to situations where imports from them do not account for "a substantial share of total imports" and they do not "contribute importantly" to the serious injury. Similarly, Article 5.3 of the United States-Israel Free Trade Agreement limits exemption from a safeguard measure to situations where imports from Israel are not "a substantial cause of the serious injury."

178 The conditional exemption in certain cases when certain subjective conditions are satisfied does not meet the requirements for asserting Article XXIV:8(b) as a defense to Article 2.2 of the Agreement on Safeguards and GATT Article I:1.

179 In its response to Panel Question 117 (paragraph 211), the United States expects to back away from the contention made in its first submission that it must eliminate safeguard measures as a "restrictive regulation of commerce" because they are not among the measures that Article XXIV:8(b) permits an FTA member to retain.¹⁵⁶ Japan assumes the U.S. changed its position because it realized that if this were true, members must also eliminate other measures that are not enumerated, particularly antidumping and countervailing duty measures. The United States has not eliminated -- and clearly has no intention to eliminate -- AD/CVD measures against Canada, Mexico and Israel.

¹⁵⁵ *Argentina –Footwear*, at para. 109, citing *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R Appellate Body Report 22 Oct. 1999, at para. 58.

¹⁵⁶ U.S. First Submission at paras. 1240-1246.

180 For all of the reasons set forth above, Japan requests that the Panel find that the U.S. exclusion of Canada, Mexico and Israel from the measures is inconsistent with Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994.

181 Japan reiterates that this claim is a separate and distinct claim from the Article 2.2 and 2.1 “parallelism” claim. It also notes that, with regard to the exclusion of imports from Israel, this is Japan’s only claim. Therefore, Japan submits that exercise of judicial economy with respect to this claim would not be appropriate because, as stated by the Appellate Body in *Australia – Salmon*:

The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and “to secure a positive solution to a dispute” [DSU Article 3.7]. To provide only a partial resolution of the matter at issue would be a false judicial economy.¹⁵⁷

IX. THE UNITED STATES FAILED AGAIN TO ABIDE BY THE PRINCIPLE OF PARALLELISM AS BETWEEN THE IMPORTS SUBJECT TO THE ITC’S INJURY INVESTIGATION AND THE IMPORTS SUBJECT TO THE MEASURE

182 In addition to the MFN claim set forth above, Japan has also argued that the U.S. measures failed to meet the parallelism standard set forth in *Wheat Gluten* and *Line Pipe*. The Panel should find that the United States has violated Articles 2 and 4 of the Agreement on Safeguards by including Canada and Mexico in the analysis of whether increased imports caused or threatened to cause serious injury, but excluding these countries from the application of the safeguard measure without providing a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources alone satisfied the conditions for the application for a safeguard measure.

183 As in previous cases where this issue has been at dispute with the United States, the ITC conducted its safeguard investigation based on the total quantity of subject imports, but the U.S. President excluded from the measure those countries that are members of the NAFTA. The Appellate Body has twice held that the United States’ failure to correlate a safeguard measure with the injury determination is in clear violation of the parallelism requirements of the Agreement on Safeguards.¹⁵⁸ This case is no different, notwithstanding U.S. protestations to the contrary.

A. The United States Violated Its Obligation to Provide a Reasoned and Adequate Explanation of How Non-NAFTA Imports Were Responsible for the Domestic Industries’ Serious Injury

184 To exclude NAFTA countries from a safeguard measure, parallelism requires a “*reasoned and adequate explanation* that *establishes explicitly* that imports from non-NAFTA sources

¹⁵⁷ *Australia – Measures Affecting the Importation of Salmon*, WT/DS18/AB/R Appellate Body Report 2 Oct. 1998, at para. 223 (footnote omitted).

¹⁵⁸ *U.S. – Line Pipe* at para. 197; *U.S. – Wheat Gluten* at para. 98.

‘satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.’”¹⁵⁹ Moreover, “[t]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous.”¹⁶⁰ As the Appellate Body found in *U.S. – Wheat Gluten* and *U.S. – Line Pipe*, a mere recitation of the facts without a detailed analysis of whether the non-NAFTA imports alone satisfy the standards for applying a safeguard measure is insufficient.

185 According to the United States, the Agreement on Safeguards “does not require separate findings specific to non-NAFTA imports for all Article 4.2 factors.”¹⁶¹ Japan respectfully asks how else would a Member ever know that the imports subject to the safeguard measure are in fact the ones causing serious injury if no causation evaluation is completed for these imports by the competent authority? Evidently, the United States simply expects us to take their word for it. Even a review of the industry-by-industry analysis in the U.S. First Written Submission demonstrates the ITC’s lackadaisical approach.

186 Consider paragraph 797, discussing the factors considered for flat rolled products:

As discussed above, in its analysis of all imports the ITC examined several factors other than increased imports alleged to be causes of serious injury to the domestic industry producing CCFRS. The ITC specifically examined: (1) declines in demand; (2) increases in domestic production capacity; (3) legacy costs; (4) intra-industry competition; (5) poor business decisions by the domestic industry; and (6) purchaser consolidation. The ITC identified and discussed in detail the nature and extent of any adverse effects attributable to each of these factors during the period of investigation and thus ensured it did not attribute to imports any injury caused by another factor. The ITC’s analysis of the effects, if any, attributable to those other factors was also equally applicable to non-NAFTA imports.

187 As this passage itself implies, these factors were not specifically compared with non-NAFTA imports. The United States expects us to simply accept that the examination of the various factors having an impact on the domestic industry would have produced the same results had the ITC considered them in comparison with non-NAFTA imports.

¹⁵⁹ *Id.* para. 188 (citing *U.S. – Wheat Gluten*, para. 98). The Appellate Body issued a similar holding in the context of transitional safeguards measures under the ATC. *See generally U.S. – Cotton Yarn*, para. 106-127 (upholding the Panel’s findings with respect to attribution, but not reaching the issue of application of measures); *U.S. – Cotton Yarn*, Panel Report, paras. 7.122-7.132. Unlike the Agreement on Safeguards, the ATC permits application of safeguards measures on individual countries, but to avoid overburdening one Member with “a disproportionate level of pain for the remedy” the authority must carefully attribute the injury caused to each exporting country. *U.S. – Cotton Yarn*, Panel Report, paras. 7.129 and 7.132. Authorities therefore cannot be allowed to “pick and choose” among Members. *Id.* para. 7.126.

¹⁶⁰ *U.S. – Line Pipe*, para. 194.

¹⁶¹ *See U.S. First Submission* at para. 749.

188 Consider also paragraph 798 concerning the specific issue of demand:

In its discussion of all imports, the ITC distinguished from the serious injury attributable to imports any effects attributable to declines in demand. It observed that declines in demand had only become evident during the last three calendar quarters of the period of investigation and could not possibly have caused the previous serious declines in the condition of the industry which occurred when demand was increasing. As the ITC noted in its analysis of non-NAFTA imports, the volume and pricing of non-NAFTA imports followed the same trends over the period of investigation as did imports from all sources. Thus the ITC's conclusions were based on the timing and trends of those imports it examined. Because the ITC found a close similarity in the trends in volume and pricing of all imports, on the one hand, and non-NAFTA imports, on the other, it was not obliged further to discuss this factor in its analysis of non-NAFTA imports.

Again, the United States expects us to accept that merely because the trends for all versus non-NAFTA imports were the same, the relevance of demand and the causal connection between non-NAFTA imports and serious injury is necessarily also the same. Perhaps this is just further evidence of how anemic the ITC's causation analysis tends to be on a regular basis, but the idea that we should just assume that similar trends in imports at different volume levels have the same effect is nonsense.

189 Similar problems exists for all other products on which the President imposed a measure. While the ITC may have considered the easier question of non-NAFTA import trends, in order to meet the increased imports standard, neither the ITC's original nor supplemental reports provide the requisite reasonable and adequate explanation of how non-NAFTA imports alone satisfied the causation standard set forth in Article 4.2. The absence of this analysis represents a violation of the parallelism principle as interpreted by the Appellate Body in *Line Pipe* and *Wheat Gluten*.

190 Even more appalling is the U.S. reasoning for its repeated failure to comply with the parallelism requirement. It boldly believes that it only needs to state explicitly the *conclusion* that non-NAFTA imports alone caused or threaten to cause serious injury, and does not need to provide an *explanation* for such findings including the results of each step of the analytical process leading to that conclusion.¹⁶²

B. The Parallelism Obligation Applies Only to Sources Subject to the Investigation, Not to Specific Products

191 It is Japan's contention that current jurisprudence on parallelism is limited to sources, *i.e.* countries, and not products. The fundamental textual basis for the Appellate Body's interpretation of the parallelism requirement in all of the disputes addressing this issue to date is

¹⁶² See U.S. First Written Submission, paras 752-53; U.S. Responses to the Questions from the Parties, para. 18 (in response to a question posed by the EC).

Article 2.2. In *U.S. – Wheat Gluten*, the Appellate Body held that Articles 2.1 and 2.2, read in concert, create the requirement stating:

The same phrase --“product...being imported” -- appears in *both* these paragraphs of Article 2... To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase “product being imported” a *different* meaning in Articles 2.1 and 2.2 of the Agreement on Safeguards. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted.¹⁶³

Therefore, “the imports included in the determination made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure under Article 2.2.”¹⁶⁴

Article 2.2, in setting the general MFN rule for safeguard measures, is first and foremost aimed at addressing the source of imports, and together with Articles 2.1 and 4.2, requires that injury and remedy be based on the same universe of sources.

192 Indeed, in Japan’s view, if the products covered by the injury determination are broader than the products covered by the measure itself, we view the measure as less restrictive than it would be otherwise, which is consistent with the purpose of Article 5.1. It should be noted that Article 5.1 provides the maximum limit of the protection. A WTO Member can lessen the degree of protection, within its discretion, by narrowing the scope of products subject to a safeguard measure.

193 Moreover, Article 3.1 reads “experts and other interested parties could present evidence and their views...as to whether or not the application of a safeguard measure would be in the public interest.” This implies that the Agreement on Safeguards allows Members to exercise discretion to take into consideration a broad range of economic interests other than that of the injured domestic industry. Indeed, during the course of an investigation the competent authority should gather information on such other interests so that it can inform the final decision. In some cases, a portion of the products subject to a safeguard measure could be essential to maintaining the competitiveness or high-quality of products produced by downstream industries in an importing country. If damage to such downstream industries outweighs the benefit enjoyed by the domestic industry producing products which are generally like or directly competitive with the imports, then a small part of the imported products could be excluded from the measure for the sake of the public interest. This is particularly true in this case, as restrictions on steel imports can have extensive negative effects on U.S. industrial users.

194 It is important to understand that the product exclusions issued by the United States in this particular case apply on an MFN basis. Hence there is no discrimination between countries, either *de jure* or *de facto*. If producers in other countries are able to produce and ship to the

¹⁶³ See *U.S. – Wheat Gluten* at para. 96 (emphasis original); see also *U.S. – Line Pipe* at para. 180.
¹⁶⁴ *Id.*

specification as set forth in the excluded product definition, they are entitled to reap the benefits of that exclusion. Indeed, this is why some requesters have strenuously objected to any quantity restrictions being placed on their exclusions.

C. Conclusion

195 The U.S. analysis is fundamentally flawed because it includes imports from all sources for its injury determination and then removes imports from NAFTA countries from the imposition of the measures. The United States could have avoided these defects by providing a reasoned and adequate explanation of the exclusion that established explicitly that the subject imports satisfied the conditions for the application of a safeguard measure. The failure of the United States to take these steps renders its safeguard measures inconsistent with the Agreement on Safeguards.

X. CONCLUSION

196 For the reasons discussed above and in our other submissions, Japan respectfully requests that the Panel:

- (a) to find that the U.S. safeguard measures are inconsistent with the Agreement on Safeguards and GATT 1994 with respect to all the requirements Japan has submitted in this panel proceeding;
- (b) to find that consequently the United States has nullified and impaired the benefits accruing to Japan under the Agreement on Safeguards and GATT 1994;
- (c) to recommend that the United States bring its safeguard measures on certain steel products in conformity with the Agreement on Safeguards and GATT 1994; and
- (d) to suggest to the DSB that in order to conform, the United States must terminate the measures.